IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1971

No. 71-1005

Supreme Court, U. S.
FILED
JAN 22 1973
MICHAEL RODAK, JR., CLERK

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEMON PAYNE,
Respondent.

PETITIONER'S
APPENDIX OF [illegible] ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MICHIGAN

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Jan. 26, 1970	Decision Granting Leave to Appeal to Michigan Supreme Court
Feb. 7, 1972	Petition for Certiorari to United States Supreme Court
Oct. 16, 1972	Order Granting Certiorari
Dec. 18, 1972	Motion for Reduction of Pre-sentence Report Denied.

ARRAIGNMENT TRANSCRIPT
(Filed January 3, 1963)

1 (1)

People of the State of Michigan

vs.

LeRoy Payne, Respondent

Case No. X-751 Dated December 14, 1962
Action: Arraignment

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Frederick Lake, Assistant Pros. Atty.
Atty. Philip A. Brown, Atty. for Respondent

MR. LAKE: May it please the court, this is the matter of the People of the State of Michigan versus LeRoy Payne. here on an information charging the crime of assault with intent to commit murder. This is the Court's Docket X-751.

Mr. Payne is represented in court by his attorney, Mr. Brown, of St. Joseph, and the record will show that a preliminary examination was had on this charge, and in the Municipal Court for the City of Benton Harbor, and that the respondent was bound over to this court to answer to this information.

(2)

Mr. Brown, will you waive further reading of this information at this time?

MR. BROWN: Respondent waives further reading of the information at this time, your Honor.

I have gone over the elements of this offense with the respondent quite extensively. I have explained to him his various rights; his right to a jury trial; his right to plead guilty to the offense; his right to plead not guilty. I have also explained to him the maximum penalty, upon a conviction, of this crime.

We have had a preliminary examination on this charge, and the People have shown probable cause here, and he was bound over.

I have also explained to him that regardless of any promises of any kind, of leniency, as to entering a plea of guilty, this was in no one's control but the court, and that the maximum penalty was life, or any term of years, for a conviction under this charge, and I have explained, as I said, the various rights to the respondent, under the constitution and the statutes, and the respondent has advised me that he wishes to tender a plea of guilty to this offense at this time.

THE COURT: Mr. Payne, you have heard what your counsel has said? Is that a correct statement (3) of the facts?

THE RESPONDENT: Yes, sir.

THE COURT: In this case, due to the publicity that I have read, which may or may not be true, I want to be very careful that you understand exactly what you are doing, and that you are not doing it because of any reason other than that you are guilty.

I take it from the examination and from your counsel that the People can prove you guilty of this charge beyond a reasonable doubt, without any use of an alleged confession that was included in the case, as I understand it. Is that correct?

THE RESPONDENT: Yes.

THE COURT: In other words, I am informed that there was a positive identification by the victim, by Victor Yost, or another officer that was with him, of your identification. Do you understand that to be the fact?

THE RESPONDENT: Yes, sir.

THE COURT: And is that the fact?

THE RESPONDENT: Yes, sir.

THE COURT: I also have been informed that you signed a confession to this crime, but that before you signed it you received some physical harm at the hands (4) of somebody, but that you have stated that you do not wish that to be considered in this matter, is that correct?

THE RESPONDENT: Yes, I'm pleading guilty because I am guilty, and I'm sorry about it.

THE COURT: That comes up later. If the court is satisfied to accept your plea of guilty, then that part about your reformation, if any, comes at a later date, and is taken into consideration by the court in passing sentence, or possibly taken into consideration. There is nothing that you can be sure of, if your plea is accepted, except that you'll be sentenced in some manner by the court for this crime, to which you are pleading guilty.

I don't know as you have stated on the record that you do plead guilty. Is that true?

THE RESPONDENT: I do plead guilty, sir.

THE COURT: Did you, on the 5th day of November, 1962, at the City of Benton Harbor, in Berrien County, Michigan, feloniously assault Victor Yost with a gun, as I understand it — although it isn't so alleged — and that you then and there intended to kill and murder?

THE RESPONDENT: Yes.

THE COURT: Nobody has promised you leniency or threatened you, to get you to plead guilty? (5) And you are pleading guilty because you did do that?

THE RESPONDENT: I have been threatened, sir, but it's not because of these threats that I'm pleading guilty.

THE COURT: You had threats, but you are not pleading guilty because you were threatened, is that correct?

THE RESPONDENT: Yes.

THE COURT: And nobody has promised you that you'll get a shorter sentence because you are pleading guilty, than if you pleaded not guilty? Is that correct? Nobody has promised you that you'll get a shorter sentence?

THE RESPONDENT: Well, sir, I mean I have talked to so many policemen and all. They said that it would be likely that if I did cooperate that —.

THE COURT: Now, if anybody has told you, or if you are of the opinion that you may get a shorter sentence if you plead guilty than you'd get if you pleaded not guilty, that's wrong. That will have no bearing on the sentence

of the court. At least it won't if I do it, and I think I'll probably be the one that does it.

Do you understand me now?

(6)

THE RESPONDENT: Yes, sir.

THE COURT: It doesn't make any difference to me whether you plead not guilty or guilty. In fact I can't accept a plea of guilty until I'm convinced that you are guilty, and you are the only one that can convince me now, because we can't try the case here today. We simply are trying to find out what you want to do, and your counsel has stated — and I'm sure he wouldn't state it if it wasn't true — that he has told you that you have a right to a trial, a jury trial, and he told you all these rights, and you understand that?

THE RESPONDENT: Yes.

THE COURT: You don't want a jury trial, and you want to plead guilty, is that correct?

THE RESPONDENT: Yes.

THE COURT: You want to plead guilty because you are guilty?

THE RESPONDENT: Yes.

THE COURT: Very well. The court feels the plea of guilty is freely, voluntarily and understandingly made, without undue influence, compulsion or duress, and without promise of leniency, and it is therefore accepted.

You are remanded to the custody of the sheriff to (7) await sentence.

The probation officer of this court will convey to the court anything that you wish the court to know, before sentence is pronounced. It will take several days, maybe weeks, to complete the case in the probation department, so that I may have the proper information before sentence is pronounced.

That's all.

SENTENCE TRANSCRIPT
(Filed March 19, 1963)

(1)

People of the State of Michigan vs. LeRoy Payne, Case No. X-751, Dated March 8, 1963. Action: Sentence.

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Philip A. Brown, Atty. for Respondent

THE COURT: Mr. Payne, you are before the court for sentence, having pleaded guilty to assault with intent to murder.

I have talked with your counsel. I have a very comprehensive report from the probation department relative to your case. I heard your testimony in the case of the People versus Lionel Bradford. I have, I think, all the facts that I need, in mind.

Do you have anything to say, or does your counsel have anything further to say? I have already talked with him, of course.

(2)

THE RESPONDENT: I'd like to say, your Honor, that I am sorry. I know that I was wrong.

THE COURT: I understood that that was your position.

MR. BROWN: I have nothing further to convey to the court, your Honor, having already talked to you.

THE COURT: Very well.

Starting with your honorable discharge from the U.S. Army in 1960 — from then on, according to your own admissions, you have been the type of citizen, or were the type of citizen, until the time you committed this crime, that would, to my mind, require elimination from society from now on.

If there is any distinction at all between superlatives, the assault of an individual with intent to murder is very

bad; assault with intent to murder a policeman is worse, if, as I say, if there is any distinction between superlatives, because that's not only an attack upon the individual, it's an attack upon society; an attack upon a representative of society as a whole.

As I say, from that side of the picture it would require, in my opinion, your complete elimination from (3) society.

Now, on the other side of the question, you have voluntarily admitted — if I remember the number correctly — eighteen breakings and enterings prior to this time, or maybe including the one that you had committed just before you committed this crime.

According to your testimony, several representatives of society were guilty of unpardonable actions in connection with their treatment of you. Now, at least some of those could possibly be explained, if not excused, by the fact, that you had shot a deputy sheriff with intent to kill him. However, you have been importuned quite strongly, as I understand it, by representatives of your race, and your own mother, that they should be prosecuted for their actions in that connection, and you have stated, according to my information, that you made a mistake, and you are asking forgiveness for that, and that they made a mistake, and that you are willing to forgive them their mistake.

I am also reliably informed, and have come to the conclusion myself, that the normal reaction we get from prisoners who are awaiting sentence, that they are going to get religion. In your case I feel it's an honest one, which quite frequently it's not. At least I have (4) become convinced of that.

The sentence that I am about to impose on you will give you hope of returning to society after a — what I consider a reasonable length of time, providing that you are honestly desirous of reformation and have a change of these past actions that you have been guilty of since you got out of the army, and that you are intelligent enough to become a useful member of society after you have paid your debt to it.

I am also informed — maybe not reliably — that the two gentlemen against whom you gave testimony, name-

ly Charles Hawkins and Lionel Bradford, have made threats upon your life, or if not that, upon causing you physical injury, so I recommend to the prison authorities that you be not incarcerated in the same place that they are, or at least not where you will come in contact with them, or they with you.

If I'm correctly informed, and I'm quite sure I am, the sentence I am about to impose on you will permit you to be subject to parole approximately ten years from this date, which will give you an opportunity, if you take advantage of the time that the statute gives you, and the extra good time that you can acquire in the penitentiary, of returning to society, assuming that you do (5) convince them, also, that you are that type of individual that should be turned loose in society.

It is the judgment of this court that you be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan, Township of Blackman, County of Jackson, under the provisions of the Michigan Code of Criminal Procedure, and the Michigan Penal Code, and the amendments thereto.

I fix the minimum term of such imprisonment at nineteen (19) years from and after this date. I fix the maximum of such term at forty years (40) from and after this date.

You are remanded to the custody of the sheriff for transmittal to Jackson.

ORDER SUPPRESSING CONFESSION
(Filed June 21, 1967)

At a session of said Court held in the Court House in the City of St. Joseph in said County on this 15th day of June 1967.

Present: Honorable Chester J. Byrns, Circuit Judge.

This matter having come on to be heard upon the Order of the Court of Appeals dated May 12, 1967, in the matter

of the People of the State of Michigan, Plaintiff-Appellee vs. LeRoy Payne, Defendant-Appellant, No. 3207 which the Court of Appeals remanded this cause to the Circuit Court for the County of Berrien to assume jurisdiction and to make a determination upon a separate record of the voluntariness of the confession and of the plea of guilty by defendant on December 14, 1962 and that in the event the Court found the confession and plea of guilty to be involuntary, that the Court enter an order vacating the sentence and plea of guilty and that the defendant be rearraigned and required to plead anew to the information.

The People having appeared by Assistant Prosecuting Attorney Harry J. Creager and the Defendant-Appellant having appeared in person and by his attorney Philip A. Brown and the Court having considered all of the testimony and evidence introduced at said hearing and being fully advised in the premises,

IT IS ORDERED that any confessions, admissions or other statements against interest, either verbal, written or stenographic during the period from the time of the Defendant-Appellant's arrest on November 5, 1962, through December 14, 1962 inclusive be and the same are hereby suppressed as being involuntary.

IT IS FURTHER ORDERED that Defendant-Appellant's sentence and plea of guilty heretofore made and entered in these proceedings be and the same are hereby vacated and are null and void.

IT IS FURTHER ORDERED that this cause be and the same hereby is remanded to the Municipal Court for the City of Benton Harbor for a preliminary examination together with such other and further proceedings which may properly come for said Court.

IT IS FURTHER ORDERED that Defendant-Appellant's bond on said charge is hereby fixed at $10,000.00.

(s) Chester J. Byrns
Circuit Judge

APPROVED:

John T. Hammond, Prosecuting Attorney
By: (s) Harry J. Creager,
Assistant Prosecuting Attorney

Business Address:
County Building
St. Joseph, Michigan

ORDER FOR CHANGE OF VENUE
(Filed August 9, 1967)

At a session of said Court held at the Court House in the City of St. Joseph on this fourth day of August, 1967.

Present: Hon. Chester J. Byrns, Circuit Judge.

This cause having come on to be heard upon the Motion of the Respondent, LeRoy Payne, for a change of venue, said Motion having attached thereto the affidavit of the respondent together with exhibits, the respondent having appeared in person and by his attorney Philip A. Brown and the People having appeared by Prosecuting Attorney John T. Hammond and the Court having considered the argument of counsel and the Court being fully advised in the premises:

IT IS ORDERED that Respondent's Motion for Change of Venue be and the same hereby is granted and said cause and the issues raised thereby shall be tried in the Circuit Court for Kent County, Michigan and the Clerk of the Court is directed to transmit all records in said cause to said Court for a trial by jury on the charge of assault with intent to murder.

(s) Chester J. Byrns
Circuit Judge

ATTEST:

(s) Mary Burns
Clerk, Dep.

Approved:

(s) John T. Hammond
Prosecuting Attorney

Business Address:
Court House
St. Joseph, Michigan

TRANSCRIPT OF SENTENCE
(Filed September 8, 1967)

(1)

People of the State of Michigan vs. LeRoy Payne. Case No. X-751. Date 30 August 1967. Action: Sentence.

Appearances:

Hon. Chester J. Byrns, Circuit Judge
Atty. Philip Brown, Atty. for Respondent

THE COURT: This is the matter of the People of the State of Michigan versus LeRoy Payne here on a conviction of guilty to the crime of assault with intent to commit murder, which verdict was rendered in Kent County, on the request of the Defendant for a Change of Venue to get a jury that might have and did have no connection whatsoever with any local media of communications. With Mr. Payne is his attorney, Mr. Philip Brown, of St. Joseph, Michigan. Mr. Brown, is there any reason why sentence cannot be pronounced at this time?

MR. BROWN: I know of no reason, Your Honor. I previously conferred with the Court regarding sentence.

(2)

THE COURT: Mr. Payne, is there any reason why I should not pronounce sentence now?

THE RESPONDENT: No, sir.

THE COURT: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence. Is there anything further that you wish to say?

I would like to note that I have discussed this with the officer making the pre-sentence investigation as well. Is there anything further that I should consider before pronouncing sentence — any circumstances you wish me to consider?

THE RESPONDENT: I have nothing to say, Your Honor.

THE COURT: Mr. Payne, you are living proof of the tremendous rights given under our law to protect the innocent even though at times, such rights may shield the guilty. You have enjoyed rights and you will enjoy them hereafter, which the average man who would have to pay his own way could not afford.

First, you have been furnished counsel, Mr. (3) Philip Brown of St. Joseph, who has done an outstanding job on your behalf and you have good reason to know, not only from his relentless efforts in getting an appeal to win you a new trial, but, as I think the record of trial itself will show, he did an excellent job in your defense in the three days that we were in Grand Rapids.

Second: On an appeal brought by you, the Michigan Court of Appeals sent this case back to Berrien County to hear your complaint about the police handling of you following the arrest which caused your confession and plea of guilty to be non voluntary.

Third: Because there was some question as a result of the handling of you by a few officers following your arrest, which we trust will never happen again in this County, they gave you every benefit of the doubt. Your guilty plea was set aside and your confession was suppressed. You were granted a new trial at which any mention of confession of guilty plea was prohibited by this Court. Since there was within this County various news and radio media who had published facts of your

(4) guilty plea and of your confession, there was a possibility that an absolutely impartial jury might not be found and a motion for a change of venue was granted for trial only, and the trial at considerable expense to the County was transferred to Kent County and there convened for three days with myself as presiding judge.

Fifth: At this three day trial, the jury was prohibited from reading or hearing any news that might possibly concern the trial. As a matter of fact, we prohibited them from reading the newspapers and we prohibited them from listening to their radios or television sets. In addition, at that trial, you got all of the benefits of law, instructions to the jury, including those instructions given on presumption of innocence on your part and the duty of the prosecution to prove your guilt beyond a reasonable doubt by all twelve of the jurors. And finally, today, after your conviction — and I will give you your sentence in a minute or two — you will still have a right to appeal at public expense if you so desire.

Mr. Payne, in presiding over your three day trial (5) I want to tell you that without any reservation, I agreed with the jury's verdict of guilty. I heard your own testimony and I heard your cross-examination, and of course I had an ample opportunity of hearing about your crime which was one of extreme violence. It was senseless; it was cruel, and frankly, I think it reflected a depravity of heart and but not for the grace of God, and the good physical condition of Victor Yost, he survived. He was shot not once, not twice, but three times. Mr. Yost has suffered and is still suffering from the near fatal wounds that you inflicted. You were there when the doctor's testimony reflected that it took some three to four hours spent in surgery trying to save this man's life. Mr. Yost is a brave and able officer and is to be complimented for the excellent and fair manner in which he testified at your trial. And a police officer, whether he may be popular with someone or not is nevertheless a symbol of authority and whoever shoots a police officer in line of duty assaults not only the officer; not only the man, but he assaults all

of society because law and order cannot (6) exist unless our officers have the respect and the protection to which they are entitled to. These are precious rights of citizenship which you and I recognize and which would not exist if it were not for officers like Victor Yost who are willing not only to work, but even to die to preserve these rights.

Assault with intent to murder, especially when a gun is used, is a most serious crime when the victim is a police officer in line of duty. I have felt since I have been judge that crime of violence are the worst, and I have felt that the use of weapons shows a willfullness and a hatred of which we have too much of in our society today.

When you appeal, and win a new trial, you wipe clean the previous conviction and sentence. You have then a presumption of innocence which I think the record will bear out and of which I maintain I protected throughout your trial and which your attorney was most zealous in insuring. This Court is no longer bound by the earlier sentence. I cite an Authority, Mr. Reporter, People versus Poole, P-O-O-L-E, 7 Michigan, Appellate 291.

(7)

THE COURT: In your trial, you might have been acquitted and set free and you also risked a larger sentence with a different judge and this is a different judge between your sentence of five and one-half years ago and today; a judge who had a more detailed account of what you did during this new trial than the judge who sentenced you on a plea of guilty and did not have the same opportunity to form impressions nor did my distinguished colleague hear all of the details as it came out in this particular trial.

I am not setting a larger sentence that what I will set in a few minutes because you appealed or because of any added work or expense of a new trial. This I assure you, and every American citizen has an absolute right to an appeal and to redress. As citizens, they are entitled to use the protection and rights that the law gives them and I would like to think that no judge will be more careful

than I to insure this which we reward no man because he pleads guilty and we punish no man because he pleads innocent. The larger sentence which I impose here is based on the nature of the crime and on the impressions which I (8) formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude. Now, I had considered a mandatory life sentence because the maximum term of imprisonment here could be any term of years up to life imprisonment. The only reason that I am not doing this is that I am looking into your past history and I have given this searching thought right up to the very last moment. You have a very poor family background for which you are not to blame, Mr. Payne. Your school reports were good and you served approximately three years in the Army and you earned an honorable discharge while in service although I believe there was a court-martial — wasn't there, Mr. Payne?

THE RESPONDENT: It was just a minor matter. It wasn't what you would call a court-martial —

THE COURT: Administrative — company punishment?

THE RESPONDENT: Yes, sir.

THE COURT: But you did receive an honorable discharge?

THE RESPONDENT: Yes, sir.

(9)

THE COURT: And by your own efforts, you completed high school and the employers you had all said that you were a good employee. I have also checked at the prison where you have been and your conduct there is reported as good during the past four years and some odd months that you have been there and that you have been using the educational and rehabilitation facilities that are available.

These are the factors which I have considered on the good side of the ledger which have frankly saved you from a sentence of life imprisonment.

The maximum term of imprisonment set by statute for the crime for which you have been found guilty is any term of years up to life imprisonment. I sentence you to be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan in the township of Blackman, County of Jackson, State of Michigan, to be confined at such penal institutions of the State as it shall direct, under the provisions of the Michigan Code of Criminal Procedure and the Michigan Penal Code, and the State Department of Corrections and amendments thereto for a minimum of twenty-five years and a maximum of (10) fifty years from and after this date. Let the record show in connection with this offense, that between the time that Mr. Payne was arrested and today, he has been detained either in the Berrien County jail or in State Prison since November 6, 1962. That was the date that he was arrested, is that right Mr. Brown?

MR. BROWN: November 5th, Your Honor.

THE COURT: November 5th, 1962, and he shall especially receive credit on this sentence both maximum and minimum for all of that period of time which our clerk here will compute on the commitment papers and which of course the Corrections Commission is aware of. In addition, the good time he has earned by credit while in State Prison will also be applied to him whether or not, Mr. Payne, you go towards your maximum or not as you know depends on your contacts while in prison.

I inform you that as a matter of your constitutional rights, you are entitled to an appellate review, that is, a review by a court higher than this, of your conviction. If you are not financially able to afford counsel for such an appeal, and you desire to appeal, this court will appoint for you without charge to you, and further such (11) counsel will be furnished such portions of the proceedings had in your case as counsel requires to prepare any post-conviction motions or to perfect an appeal.

If you wish such assistance of counsel, you must complete these forms which I now give you and file a copy of each with the court within 60 days from now and you

must also give a copy of each to the office of Prosecuting Attorney of this County.

Will you please acknowledge receiving in duplicate an Affidavit of Financial Condition, Form 6404 and Petition for Appellate Counsel, 6402. Have you received them?

THE RESPONDENT: Yes, I have.

THE COURT: Any bond previously authorized in this case is cancelled and the Defendant is remanded to the Sheriff of Berrien County for the execution of sentence. That's all.

AFFIDAVIT OF JUDGE BYRNS

"In accordance with the direction of the Supreme Court of Michigan in the above cause, I, Chester J. Byrns, being first duly sworn, say that:

"I. I am and have been since January 1, 1967, one of the judges of the Second Judicial Circuit of Michigan (Berrien County).

"2. Leroy Payne, defendant-appellant in the above cause, pled guilty on December 14, 1962, before the Honorable Philip A. Hadsell, Circuit Judge, now retired, to the crime of assault with intent to murder, and was sentenced to 19-40 years.

"3. On June 15, 1967, I suppressed a confession of Mr. Payne, set aside his guilty plea and granted him a new trial based on his claim that improper means were used by the police to secure his confession which he claimed was involuntary.

"4. On August 4, 1967, I granted Mr. Payne's motion for a change of venue and transferred and heard the jury trial in Grand Rapids (Kent County), Michigan, which resulted in a verdict of guilty of assault with intent to commit murder.

"5. During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three

days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes.'

"6. Unlike Judge Hadsell who had Mr. Payne before him for only a few minutes at the time of plea and again at sentence, I had the opportunity to observe and hear Mr. Payne who took the witness stand and who was examined and cross-examined extensively. Mr. Payne's story and claim in trial of not being at all involved in the crime was in direct conflict with what he told Judge Hadsell both at arraignment and at the plea of guilty where he not only admitted his crime but expressed sorrow and regret for it and showed thereby a remorse for his crime. At time of sentence Judge Hadsell said he believed Mr. Payne's claim of regret. At the time of sentencing by me on August 30, 1967, when given the opportunity to state anything he wished me to consider, Mr. Payne replied, 'Nothing.'

"7. At the jury trial before me Mr. Payne repeatedly denied under oath not only shooting Officer Victor Yost, but claimed under oath he was home with his wife and had while waiting earlier at church for his children at Sunday School gotten the gun used in the Yost shooting as security for a $3.00-loan to an unknown stranger and this gun and Payne's car were allegedly stolen the night of the shooting. This court believes this was a tissue of lies and so did the jury.

"8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged

with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I receive.

"9. At the trial of People v. Lionel Bradford (Berrien circuit No. X-768, Michigan Supreme Court No. 52072), a co-defendant with Payne, who was found guilty by jury of assault with intent to murder Charles Plummer (who was shot along with Officer Yost but who was out of the country at the trial of Mr. Payne) Plummer testified (Bradford trial transcript pp 49, 50, and 180) that while he (Plummer) was wounded and lying on the ground, Mr. Payne came back and stood by the left fender of the car and deliberately fired right at him.

"10. Payne testified at Bradford's trial (February 4, 1963) that Lionel Bradford and Payne were driving a 1955 blue and white 2-door Pontiac on November 5, 1962 in the early morning hours. After having broken into a restaurant in South Bend, Indiana, and a clothing store near Benton Harbor, Michigan, Payne testified that he and Bradford were stopped by a police vehicle on M-139. Bradford had told Payne he 'would not be taken.' As they stopped, Bradford and Payne jumped from their vehicle and began firing at the two officers, hitting both of them.

"Payne remembered going back to one of the officers but couldn't recall exactly what then happened. Both men subsequently jumped into their car and fled, Payne giving his gun to Bradford in a ravine and returning home where he (Bradford transcript pp 45-60) was subsequently arrested.

"On September 2, 1965, nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he gave 'false testimony' at the Bradford trial. He

said that the only reason he testified at that trial was due to fear of the police, that Bradford never admitted committing crimes, and that Bradford had denied being present when the officers were shot. Further, Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Bradford on either the date of the shooting or the day before.

"11. At the Payne trial before me, in far greater detail than would have been present in a plea of guilty, it was established before me beyond a reasonable doubt that Mr. Payne had participated in the deliberate, cold-blooded attack upon and wounding three times of Officer Yost under conditions that Mr. Yost could not properly defend himself, which I felt then and do now showed a depravity of mind.

"12. I had the details of the nature of the wounds and the medical fight to save Officer Yost's life from Mr. Yost and from his surgeon, Dr. Robert Reagan, as well as the residual and continuing damage to Mr. Yost, which Judge Hadsell on a plea of guilty would not have had.

"13. I had as a result of the trial and many facts brought out therein the conclusion that only by divine providence and not because of Mr. Payne was the life of Officer Yost saved.

"14. As stated at the time of sentencing, my increase in sentence to 25-50 years was not because the defendant asked for and got a new trial (which I granted) or a change of venue (which I granted), but because of the conditions and facts stated by me to Mr. Payne at the time of sentencing as well as the above matters which I do not believe were all known to Judge Hadsell.

"15. Further deponent says not.

[Subscribed, sworn, etc.]"

AFFIDAVIT IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs. No. 71-1005

LEROY PAYNE,
Respondent.

---

1. I am and have been since January 1, 1967, one of the Judges of the Second Judicial Circuit of Michigan (Berrien County).

2. I am the same person who executed at the request of the Supreme Court of Michigan on May 10, 1971, an affidavit relative to my participation in the case of the People v Leroy Payne and the same judge who sentenced Leroy Payne to 25 to 50 years.

3. In recently reexamining said affidavit, it appears that I could have noted in paragraph 6 that Judge Hadsell also had some limited opportunity to see and hear Mr. Payne when he testified as a witness for the prosecution against his accomplice or codefendant, Lionel Bradford, and admitted his personal involvement in the shooting of the two police officers, as more particularly set forth in paragraphs 9 and 10 of said affidavit.

4. Further, by way of supplement to said affidavit, this court did receive and study prior to sentencing Mr. Payne a supplemental pre-sentence report which it cannot under the present Michigan law make public, but which a higher court than this one can order produced.

Chester J. Byrns

County of Berrien

ss.

State of Michigan

On this 29th day of November, 1972, before me personally appeared Chester J. Byrns, one of the judges of the Second Judicial Circuit, who, being duly sworn, did acknowledge that he did sign the above affidavit by him made and that the same was true to the best of his knowledge and belief.

Ronald H. Smith
Notary Public, Berrien County, Michigan.
My commission expires March 5, 1976

Supreme Court of the United States

No. 71-1005 ---October Term, 19--

Michigan,

Petitioner,

v.

Leroy Payne

Order allowing certiorari. *Filed* October 16 ----- , 19 72.

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan *is granted.*

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEROY PAYNE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The People of the State of Michigan, Petitioner, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on November 9, 1971.

CITATION OF OPINIONS BELOW

The original Opinion of the Michigan Supreme Court dated November 9, 1971 is reported as 191 N.W. 2d 375, and attached as Appendix A hereto. The Opinion of the Michigan Court of Appeals affirming the judgment of the trial Court is reported at 170 N.W. 2d 523, and attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on November 9, 1971.

Jurisdiction is invoked under United States Supreme Court Rule 19, 28 USCA.

QUESTIONS PRESENTED FOR REVIEW

1. Under the facts of this case, is the second sentence of Defendant fair and in accordance with Due Process?
2. Is this sentence in accord with *North Carolina vs. Pearce*?
3. Should *North Carolina vs. Pearce* be applied retroactively?

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Constitutional provision involved, in material part, is as follows:

> AMENDMENT XIV Sec 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

On the night of November 5, 1962, two police officers, Berrien County Sheriff's Deputies Vic Yost and Charles Plummer, were shot and critically wounded on a street in the City of Benton Harbor, Michigan by two assailants. The assailants were, the driver, Leroy Payne, and the passenger, Lionel Bradford, of a vehicle which the deputies had just stopped for a traffic violation. As the officers exited their vehicle and began walking toward the assailants' car, the two men jumped from that car and began shooting at the deputies. Both officers were hit and immediately downed. Leroy Payne then walked back and, while standing next to Deputy Plummer, fired again at him at point-blank range. The assailants then left the scene.

Payne was apprehended at his home later that evening. After improper treatment by some police officers, Payne confessed to having participated in the double shooting.

On December 14, 1962, Payne was arraigned in Berrien County Circuit Court before the Honorable Philip Hadsell,

Circuit Judge, and pleaded guilty to Assault on Officer Vic Yost with Intent to Commit Murder. At that arraignment, an indication of the coerced nature of Payne's confession first appeared in the record. Defendant acknowledged that he had been threatened and abused, but that he was not pleading guilty because of those threats and that abuse, but rather because he was guilty. (See Appendix C)

On March 8, 1963, Judge Hadsell sentenced Payne, noting explicitly in the record the latter's sincere compunction for having committed the offense and his forgiving the officers who abused him as the reasons for his sentence being lighter than it otherwise might have been. He then sentenced Payne to 19-40 years in the penitentiary, suggesting that, should Defendant's contrite attitude continue, he could be released in ten years. (See Appendix D)

Michigan Court of Appeals on May 12, 1967, remanded the Payne case to the Berrien County Circuit Court for an Evidentiary Hearing on the voluntariness of Defendant's statement to the police and his plea of guilty.

Berrien County Circuit Judge Chester J. Byrns held that hearing and subsequently filed an Order on June 21, 1967, finding Payne's confessions and his plea to have been involuntarily given and ordered a trial to be held on the matter. Judge Byrns later ordered a change of venue for that trial to Kent County (Grand Rapids), Michigan, to avoid any possible prejudice to Defendant at trial.

On August 24, 1967, after a three-day jury trial before Judge Byrns, in which the involuntary confessions were not admitted, and in which Defendant took the stand to deny any involvement in the shooting and to establish an alibi defense, Leroy Payne was found guilty again of Assault on Officer Vic Yost with Intent to Commit Murder.

At the sentencing hearing on August 30, 1967, Judge Byrns imposed a sentence of 25-50 years upon the Defendant, reasons for which he gave during that hearing. (See Appendix E)

Two years later, on June 23, 1969, the United States Supreme Court decided the cases of *North Carolina vs. Pearce*, and *Simpson vs. Rice*, both reported at 395 U.S. 711, 89 S. Ct. 2072, 23 L Ed 2d 656, dealing with the propriety

of higher sentences after retrial following reversal of the original conviction.

The Michigan Court of Appeals affirmed the Payne case, including the increased sentence on June 25, 1969. (See Appendix B) On appeal to the Michigan Supreme Court, that Court affirmed Defendant's conviction but did, in a four to three Opinion, remand for resentencing in accordance with the majority's retroactive interpretation of *North Carolina vs. Pearce,* supra. (See Appendix A)

During the course of the Michigan Supreme Court's deliberations, that Court made a formal request of Judge Byrns for an affidavit stating his reasons for imposing the second and higher sentence. Judge Byrns complied. (See Appendix F)

REASONS FOR GRANTING THE WRIT

The imposition of the sentence in a criminal matter is the final, and, for the Defendant personally and for society as a whole, the most critical phase of the criminal prosecution. Confusion on the question of limitations imposed by the Constitution, statutes and higher Court rulings on the sentencing judge is intolerable and must be dispelled.

But confusion exists throughout the Country on the propriety of the higher sentence after a second conviction of a Defendant for the same offense, where the first has been reversed or vacated. *North Carolina vs. Pearce,* supra, laid down a standard which desperately needs clarification.

The Michigan Supreme Court, noting the conflicting interpretations of the *Pearce* case by other state and federal courts has interpreted it in its own unique manner. The Michigan Supreme Court decision was arrived at only after an unusually turbulent period of deliberations, chronicled by Mr. Justice Black in his dissent (joined by Mr. Justice Adams). The four to three split and the sharp cleavage in the supporting rationales indicates the depth of confusion.

In fact, throughout the opinions of the majority and Justice Brennan's and Justice Black's dissent, runs a plea for guidance in clarification in this case and in future ones on similar problems from the United States Supreme Court, which plea this petition, among other reasons stated, seeks to satisfy.

Specifically, the Court below seeks a definitive explanation of how *Pearce* is to be interpreted where, as in the Payne case, it is clear that each judge in a sentencing was confronted with a different situation.

The Leroy Payne that Judge Hadsell sentenced was a contrite man, expressly admitting his crime and forgiving his abusers as he hoped to be forgiven by his victim. Judge Hadsell further had only the vaguest sketch of the details of the crime. In fact, it was limited at the time of plea to the answer "Yes" to the Court's question "Did you, on the fifth day of November, 1962, at the City of Benton Harbor, in Berrien County, Michigan, feloniously assault Victor Yost with a gun, as I understand it — although it is not so alleged — and that you then and there intended to kill and murder?" (See Appendix C)

However, the Leroy Payne facing Judge Byrns, was a man who had been observed by the Judge during three days of trial, had testified, not only showing no compunction, but specifically creating an alibi which the Kent County Jury as well as the trial Judge must have found to be a lie. Furthermore, Judge Byrns heard more details of the crime than had been made known to Judge Hadsell, at least at the plea taking arraignment before Judge Hadsell.

This Court should issue the Writ for six reasons, considered separately below.

1. The higher sentence by Judge Byrns did not deny this Defendant due process.

It was conceded below that the Byrns sentence was within the statutory limits for this crime in Michigan. Thus, this Defendant was informed and knew that he could be sentenced to any term of years up to life. When he pleaded

guilty before Judge Hadsell he accepted the sentence with apparent sincere penitence, and must have known when he appealed his conviction that, should he later lie at the trial he was demanding, if it was discovered he would stand naked before the second sentencing judge as not only a violent felon, but an unrepentant and lying one as well. In addition, he must have known that at such trial there would be the fulest airing of all the details of the shooting.

None of the lower courts found Judge Byrns to be guilty of any vindictive or retaliatory motivation towards this Defendant, and in fact found to the contrary. Judge Byrns himself had vacated Payne's plea, granted the new trial, and granted a change of venue, in addition to suppressing the confession Payne made.

2. Allowing a higher sentence in this type of situation will not improperly "chill" the exercise of a Defendant's right to appeal.

It is a fact common to all human experience that a person called by an authority to answer for his errors, when he admits them in a plea of guilty, will generally try to minimize their importance to the one in authority to hopefully minimize the punishment for them. This is the common experience of trial level judges as well.

Likewise, it is common human experience that a person who, when confronted by clear evidence of guilt, lies to avoid conviction of guilt, evidences a poorer character than one who tells the truth and lets the chips fall where they may. Such common human truths are or should be as well known to those accused with crime. Furthermore, while no one may penalize him for appealing, he himself can be reassessed prior to a second sentencing. That reassessment should reasonably include a review of the crime as proven, and the direct, personal and more extensive contact the new judge would have.

These are not difficult legal concepts that only the legal profession is able to comprehend. They are simple facts of life that mankind as a whole should, and does, understand and live by.

Holding a Defendant to the obligation to tell the truth, if he chooses freely to take the stand in his own defense, is not constitutionally, legally or morally repugnant. The principle has been reaffirmed recently in another context by this Honorable Court in *Harris vs. New York,* ..... US ....., 28 L Ed 2d 1, 92 S. Ct. ..... (1971). It is only right, legally and morally, that the old backroom maxim that a Defendant should be allowed a few lies to protect himself should be forever scotched.

3. North Carolina vs. Pearce allows this second sentence.

The *Pearce* case, relied upon so heavily by the Michigan Supreme Court, when properly understood and interpreted, approves of the sentencing procedure followed by Judge Byrns. His reasons, expressed both at sentencing and later in his affidavit, (Appendix F) are those envisioned in *Pearce*:

A. New information about the nature and details of the crime was presented to Judge Byrns (but not available to Judge Hadsell).

B. Identifiable conduct occurring after the first conviction, consisting in Defendant's change of heart from contrition to denial, his lies under oath, and his behavior for three days at trial and his lack of any contrition prior to the second sentence.

And in addition, the procedural requirements of *Pearce*, and the approved procedure in the *Moon vs. Maryland*, Cert granted (1969), 395 US 975, 89 S. Ct. 2135, 23 L Ed 2d 764; Writ Dismissed (1970), 398 US 319, 90 S. Ct. 1730, 26 L Ed 2d 262, were met. Judge Byrns put on the record at the hearing his reasons for the higher sentence. He later submitted an affidavit amplifying on the pre-Pearce sentencing record he made in far more detail than was done in *Moon*.

4. To construe Pearce so as to prohibit the imposition of a higher sentence in cases similar to Payne would be bad precedent.

To disallow a judge from sentencing a convicted defendant more severely than the same defendant was sentenced in such a situation as Payne presents would be to favor the lying Defendant over the truthful one.

Where a defendant pleads guilty, perhaps as a result of a plea bargain, or for whatever reason, and convinces a judge of his sincere purpose to amend his life, then, upon a retrial granted for whatever reason, he is free to do whatever he wishes without fear of that conduct being held against him at sentencing. He has set a ceiling on his sentence no matter how heinous the crime or how depraved a liar he may subsequently be proved to be.

Such a precedent could produce disastrous and unjust results.

5. North Carolina vs. Pearce should not apply retroactively.

As in *Miranda vs. Arizona,* 384 US 436 (1966), where the Court laid down procedural requirements which law enforcement officers must comply with before a statement which is the product of custodial interrogation is admissible, so in *North Carolina vs. Pearce,* supra, the Court laid down guidelines for the imposition of increased sentences.

The *Miranda* requirements were not made retroactive. *Johnson vs. New Jersey,* 384 US 719 (1966). Nor should *Pearce* be made retroactive. At the time Judge Byrns imposed the sentence under review, *Pearce* had not been decided. A trial judge should not, among the many characteristics he is required to exhibit, be held accountable for not having prescience of a new procedural rule two years later.

6. Conflict exists in the state and federal courts as to the meaning of Pearce and the Michigan Supreme Court is specifically asking for guidance.

As noted in the Opinion of the Michigan Supreme Court, a substantial conflict exists among the jurisdictions, state and federal, as to the meaning of *Pearce.*

Specifically referring to the language "identifiable conduct occurring after . . . the original sentencing" appearing in *Pearce,* a conflict exists as to whether only *conduct* which happens after the original sentencing can be considered in aggravation. See *Barnes vs. US,* (DC Circuit 1969) 419 F 2d 753 (dissenting opinion); *Torrance vs. Henry,* (US DC Edne, 1969) 304 F Supp 725; *Pinkard vs. Neil,* (US DC MD Tenn, 1970), 311 F Supp 711; *Walsch vs. Commonwealth,* (Mass, 1970), 260 NE 2d 911 (dictum at 916). Others hold or indicate that regardless of when the defendant's "identifiable conduct" occurred, if it first comes to a sentencing judge's attention after the time of the first sentencing it may be relied upon in support of a harsher penalty. See, e.g. *United States vs. Kienlen,* (CA 10, 1969) 415 F 2d 557; *United States vs. Gross,* (CA 8, 1969) 416 F 2d 1205; *United States vs. Barash,* (CA 2, 1970) 428 F 2d 328.

Furthermore, the Michigan Supreme Court continually refers in its opinion to hoped-for guidance from this Court. Specifically it seeks a ruling on Pearce's retroactivity (See footnote 2 of the Opinion of the Michigan Supreme Court, Appendix A). It also requests an authoritative interpretation of the same section when it says after noting the above-cited conflicts in decisions:

> "Pending clarification of Pearce's requirements by the United States Supreme Court, we are persuaded that . . ."

Justice Brennan in his dissent for reasons stated therein seeks a complete overturning of *Pearce* on the grounds that it should be *impermissible* to use *any conduct* of a defendant's occurring after the conviction as grounds for a second sentence.

CONCLUSION AND RELIEF REQUESTED

For these six reasons and others which the record, briefs and argument may disclose, the decision of this Court should be to grant the Petition of the People of the State of Michigan and to issue a Writ of Certiorari to review these most important questions.

Respectfully submitted,

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Prosecuting Attorney

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APPENDIX A — OPINION OF THE MICHIGAN SUPREME COURT

(Filed November 9, 1971 — 35/April 1971)

In the Supreme Court of the State of Michigan

The People of the State of Michigan, Plaintiff-Appellee,
vs.
Leroy Payne, Defendant-Appellant.

BEFORE THE ENTIRE BENCH.

T. M. KAVANAGH, C.J.

Defendant-appellant Leroy Payne was convicted in the Berrien county circuit court, by his guilty plea, of assault with intent to murder.[1] On March 8, 1963, he was sentenced by the Honorable Philip A. Hadsell to a minimum of 19 years and a maximum of 40 years in prison. At the conclusion of a hearing subsequently ordered by the Court of Appeals, Payne's guilty plea and a prior confession were determined to have been involuntary and his conviction and sentence were vacated. Motion for a change of venue was granted to Kent county. Payne was reconvicted of assault with intent to murder by a jury in Kent county circuit court. Upon remand to Berrien county, the Honorable Chester J. Byrns, Berrien county circuit judge, who had presided over Payne's Kent county trial, sentenced him to prison for a term of 25 to 50 years with credit for time served and "good time" earned.

The following excerpt from the transcript of appellant Payne's second sentencing is pertinent to his claim, hereinafter discussed, that the sentence imposed was excessive:

> "THE COURT: * * * Mr. Payne, in presiding over your three day trial, I want to tell you that

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[1] MCLA § 750.83 (Stat Ann 1962 Rev § 28.278). The crime is punishable by imprisonment for life or any number of years.

without any reservation, I agreed with the jury's verdict of guilty. I heard your own testimony and I heard your cross-examination, and of course I had an ample opportunity of hearing about your crime which was one of extreme violence. It was senseless; it was cruel, and frankly, I think it reflected a depravity of heart and but not for the grace of God, and the good physical condition of Victor Yost, he survived. He was shot not once, not twice, but three times. Mr. Yost has suffered and is still suffering from the near fatal wounds that you inflicted. You were there when the doctor's testimony reflected that it took some three to four hours spent in surgery trying to save this man's life. Mr. Yost is a brave and able officer and is to be complimented for the excellent and fair manner in which he testified at your trial. And a police officer, whether he may be popular with someone or not is nevertheless a symbol of authority and whoever shoots a police officer in line of duty assaults not only the officer; not only the man, but he assaults all of society because law and order cannot exist unless our officers have the respect and the protection to which they are entitled to. These are precious rights of citizenship which you and I recognize and which would not exist if it were not for officers like Victor Yost who are willing not only to work, but even to die to preserve these rights.

"Assault with intent to murder, especially when a gun is used, is a most serious crime when the victim is a police officer in line of duty. I have felt since I have been judge that crimes of violence are the worst, and I have felt that the use of weapons shows a willfullness and a hatred of which we have too much of in our society today.

"When you appeal, and win a new trial, you wipe clean the previous conviction and sentence. You have then a presumption of innocence which I think the record will bear out and of which I maintain I protected throughout your trial and which your attorney was most zealous in insuring. This Court is no longer bound by the earlier sentence. I cite an authority. Mr.

Reporter, *People* versus Poole, P-O-O-L-E, 7 Michigan, Appellate 291 [sic].

"*In your trial, you might have been acquitted and set free and you also risked a larger sentence with a different judge and this is a different judge between your sentence of five and one half years ago and today; a judge who had a more detailed account of what you did during this new trial than the judge who sentenced you on a plea of guilty and did not have the same opportunity to form impressions nor did my distinguished colleague hear all of the details as it came out in this particular trial.*

"*I am not setting a larger sentence than what I will set in a few minutes because you appealed or because of any added work or expense of a new trial.* This I assure you, and every American citizen has an absolute right to an appeal and to redress. As citizens, they are entitled to use the protection and rights that the law gives them and I would like to think that no judge will be more careful than I to insure this which we reward no man because he pleads guilty and we punish no man because he pleads innocent. *The larger sentence which I impose here is based on the nature of the crime and on the impressions which I formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude.* Now, I had considered a mandatory life sentence because the maximum term of imprisonment here could be any term of years up to life imprisonment. The only reason that I am not doing this is that I am looking into your past history and I have given this searching thought right up to the very last moment. You have a very poor family background for which you are not to blame, Mr. Payne. Your school reports were good and you served approximately three years in the Army and you earned an honorable discharge while in service although I believe there was a court-martial — wasn't there, Mr. Payne?

"THE RESPONDENT: It was just a minor matter. It wasn't what you would call a court-martial —

"THE COURT: Administrative — company punishment?

"THE RESPONDENT: Yes, sir.

"THE COURT: But you did receive an honorable discharge?

"THE RESPONDENT: Yes, sir.

"THE COURT: And by your own efforts, you completed high school and the employers you had all said that you were a good employee. *I have also checked at the prison where you have been and your conduct there is reported as good during the past four years and some odd months that you have been there and that you have been using the educational and rehabilitation facilities that are available.*

"These are the factors which I have considered on the good side of the ledger which have frankly saved you from a sentence of life imprisonment." (Transcript of sentence, pp 4-9) (Emphasis added.)

The Court of Appeals affirmed (Quinn, P.J. and Holbrook, J.; T. M. Burns, J., dissenting). 18 Mich App 42. Appellant is here on leave granted. 383 Mich 760.

The questions of the propriety and constitutionality of imposing a harsher sentence after a defendant has overturned his conviction on appeal and been reconvicted have long divided American courts. Annotation, 12 ALR3d 978; Van Alstyne, "In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant," (1965), 74 Yale L J 606; Comment (1968), 28 Md L Rev 64. This Court recently considered the problem in *People v. Olary* (1969), 382 Mich 559. In upholding a harsher penalty upon reconviction, the *Olary* majority distinguished the case of *North Carolina v. Pearce*[2] [*Simpson v. Rice*] (1969), 395 US 711 (89 S Ct 2072, 23 L Ed 2d 656), hereinafter discussed, on the grounds that defendant Olary's

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[2] The United States Supreme Court has not yet decided whether *Pearce* is to be applied retroactively. Although the Court twice granted certiorari to consider the question, in each case the writ was subsequently dismissed as improvidently granted. *Moon v. Maryland,* cert granted

> "original sentence was imposed by a justice of the peace, not required to be legally trained, and the second sentence was by a circuit judge, a duly licensed lawyer, after report to him, as provided by statute, by the probation officer as to defendant's background, record and attitude, to enable the circuit judge to fit the punishment to the offender." (*Olary, supra,* at 567.)

Further distinguishing *Pearce, supra,* the Court noted that Mr. Olary's second conviction and resentencing were not occasioned by his having demonstrated to a superior tribunal that his original conviction was tainted with constitutional error but by his decision to assert his right to a trial de novo in the circuit court.[3]

Assuming *Pearce, supra,* was properly distinguished in *Olary, supra,* we do not think the present case is distinguishable because unlike *Olary* this case involves a

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(Footnote 2 continued)

(1969), 395 US 975 (89 S Ct 2135, 23 L Ed 2d 764), writ dismissed (1970), 398 US 319 (90 S Ct 1730, 26 L Ed 2d 262); *Odom v. United States,* cert granted (1970), 399 US 904 (90 S Ct 2203, 26 L Ed 2d 559), writ dismissed (1970), ... US .... (91 S Ct 112, 27 L Ed 2d 122). We decline to predict the high Court's answer to the question of *Pearce's* retroactive or prospective application, but we will apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce,* discussed *infra,* pending clarification by the United States Supreme Court.

[3] It is noteworthy that *Olary, supra,* involved a misdemeanor. While all criminal defendants are entitled to due process of law, our Constitutions require stricter standards and procedures in many respects when the offense charged is serious and threatens the defendant with more severe punishment. See, *e.g., Duncan v. Louisiana* (1968), 391 US 145 (88 S Ct 1444, 20 L Ed 2d 491), rehearing den 392 US 947 (88 S Ct 2270, 20 L Ed 2d 1412). But see *Wood v. Ross* (CA 4, 1970), 434 F2d 297, involving harsher sentence on appeal and de novo trial in circuit court, than that imposed in justice court.

felony conviction, a reversal by way of appeal because of constitutional error, and disparate sentences, imposed by judges of the same level and court, both of whom were provided with the statutory presentencing reports.[4] We, therefore, proceed to consider appellant Payne's contention that the imposition of a harsher sentence following his successful appeal and reconviction was violative of the 14th Amendment due process standards and procedures laid down in *North Carolina v. Pearce, supra.*[5]

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[4] Nor is the present case distinguishable from *Pearce, supra,* because Mr. Payne's original conviction was by guilty plea, that is, because only the second sentencing judge had the opportunity to gain impressions of Mr. Payne and his crime throughout a trial. In *Pearce's* companion case, *Simpson v. Rice,* Mr. Simpson's original convictions were by guilty plea; he was subsequently reconvicted by a jury, whereupon he received a stiffer sentence. Whatever our own views are, we cannot ignore the fact that the United States Supreme Court did not find this difference between *Simpson* (one trial) and *Pearce* (two trials) worthy of distinguishing note. The holding of the Court as regards harsher sentence upon reconviction applied fully to both cases.

[5] My Brother Black asserts, *infra,* p. ....., that *Pearce* is "doubtful fard," that is, lacking in precedential force, because Mr. Justice Stewart's opinion for the Court failed to gain the unreserved endorsement of at least five Justices. The following quotations from two of *Pearce's* concurring opinions demonstrate that the signers thereof declined to give Mr. Justice Stewart's opinion their unreserved endorsement primarily because they would go further to declare that the United States Constitution absolutely forbids the imposition of a harsher sentence upon reconviction:

"Although *I agree with the Court as to the reach of due process,* I would go further. It is my view that if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy." (Opinion of Mr. Justice Douglas, joined by Mr. Justice Marshall, at pp 726, 727. Emphasis added.)

In *Pearce* the United States Supreme Court held, *inter alia,* that neither the equal protection clause of the 14th Amendment nor the double jeopardy clause of the 5th Amendment imposes an absolute bar to a more severe sentence upon reconviction. But the Court further held that the due process clause of the 14th Amendment requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part

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(Footnote 5 continued)

"*Were these cases to be judged entirely within the traditional confines of the Due Process Clause of the Fourteenth Amendment, I should, but not without some difficulty, find myself in substantial agreement with the result reached by the Court.* However, the Court today, in *Benton v. Maryland* [(1969), 395 US 784 (89 S Ct 2056, 23 L Ed 2d 707)] * * * has held, over my dissent, that the Double Jeopardy Clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment Due Process Clause. * * *

"Given *Benton,* it is my view that the decision of this Court in *Green v. United States,* 355 US 184 (1957) [78 S Ct 221, 2 L Ed 2d 199], from which I dissented at the time, points strongly to the conclusion, also reached by my Brother Douglas * * * that the Double Jeopardy Clause of the Fifth Amendment governs *both* issues presently decided by the Court. * * *

"I therefore conclude that, consistent with the Fifth Amendment, a defendant who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed." (Opinion of Mr. Justice Harlan, beginning at p 744. Emphasis partly in original, partly supplied by the present writer.)

Thus the holdings of six of the eight Justices who sat in *Pearce* firmly support the position we take in the present case. Since three of the Justices who declined to sign Mr. Justice Stewart's *Pearce* opinion think the United States Constitution absolutely forbids imposition of a harsher sentence upon reconviction, the present opinion can hardly be said to "outrun" the United States Supreme Court. See Justice Black's opinion, *infra,* p. .....

in the second sentence he receives; and the defendant must be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge. Resolution of the Federal constitutional question raised by appellant Payne requires interpretation and application of the following language from *Pearce, supra*:

> "A trial judge is not constitutionally precluded • • • from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 US 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York, supra*, that a State may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.' *Id.*, at 247." (at p 723)
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> "In order to assure the absence of such a motivation [*i.e.*, vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (at p 726)

The above language raises the following question: May the judge who imposes a harsher sentence upon reconvic-

tion rely on information not possessed by the first judge regarding defendant's conduct prior to the time of his first sentencing? If not, the sentence imposed by Judge Byrns was excessive because it appears his only knowledge of Payne's conduct *after* the first sentencing was that he had earned "good time" while in prison and had been taking advantage of prison educational and rehabilitation facilities. Judge Byrns stated, *supra,* that he based his decision to impose a stiffer sentence on impressions of Payne and his crime formed during the trial.

The question arises primarily because of ambiguous language in the following sentence from *Pearce, supra,* quoted earlier:

> "Those reasons [for imposing a harsher penalty] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." (at p 726).

Does "occurring after * * * the original sentencing" refer to defendant's "identifiable conduct" or to acquisition of "objective information" regarding his conduct before or after original sentencing? Since *Pearce* was decided, lower courts have split over interpretation of the above language. Some opinions hold that only *conduct* of the defendant occurring after his original sentencing may be relied upon by the sentencing judge who imposes a harsher penalty. See, *e.g., Barnes v. United States* (DC Cir, 1969), 419 F2d 753 (dissenting opinion); *Torrance v. Henry* (USDC EDNC, 1969), 304 F Supp 725; *Pinkard v. Neil* (USDC MD Tenn, 1970), 311 F Supp 711; *Walsh v. Commonwealth* (Mass, 1970), 260 NE2d 911 (dictum at 916). Others hold or indicate that regardless of when the defendant's "identifiable conduct" occurred, if it first comes to a sentencing judge's attention after the time of the first sentencing it may be relied upon in support of a harsher penalty. See, *e.g., United States v. Kienlen* (CA 10, 1969), 415 F2d 557; *United States v. Gross* (CA 8, 1969), 416 F2d 1205; *United States v. Barash* (CA 2, 1970), 428 F2d 328.

The conflicting interpretations of the *Pearce* requirements were not resolved by the opinion of the United States Supreme Court accompanying its dismissal of a writ of certiorari in *Moon v. Maryland, supra.* Certiorari had been granted to consider whether *Pearce, supra,* should be applied retroactively. In dismissing the writ as improvidently granted the Court said:

> "As an appendix to its brief, the respondent has filed an affidavit of the judge who presided at the second trial, setting out in detail the reasons he imposed the 20-year prison sentence. Those reasons clearly include 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.'" (at p 320)

We have obtained a copy of the referenced trial judge's affidavit. Unfortunately, for our purposes, the Maryland judge who resentenced Mr. Moon considered conduct which occurred after the first sentencing. Therefore, *Moon* doesn't tell us whether *Pearce* allows a harsher sentence even though there is no (known) conduct of the defendant occurring after the first sentencing which would support a stiffer sentence.[6]

Pending clarification of *Pearce's* requirements by the United States Supreme Court, we are persuaded that those courts are correct which have interpreted *Pearce* to require that the "identifiable conduct" of the defendant upon which

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[6] Similarly the per curiam opinion accompanying dismissal of the writ in *Odom v. United States, supra,* does not answer our question. The opinion gives as the reason for dismissing the writ as improvidently granted that the order of the district court denying Mr. Odom's motion to set aside his second sentence "makes it clear that the greater severity of the second sentence was based on conduct on the part of the petitioner occurring after the time of the original sentencing proceeding, and that the new information was specifically referred to at resentencing." (*Odom, supra,* at p 112.)

a resentencing judge relies in imposing a stiffer sentence must have occurred *after* the first sentencing.[7] That the *Pearce* Court intended this result is evidenced by Mr. Justice White's one sentence opinion advocating the opposite result:

> "I join the Court's opinion except that in my view Part II-C [standards and procedures governing harsher sentence upon reconviction] should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." (*Pearce, supra,* at p 751.)

Furthermore, our interpretation is in accord with the grammar of the ambiguous *Pearce* language. "Information" does not "occur," it is obtained. "Conduct" "occurs."

We conclude, and hold, that the imposition of a harsher sentence upon reconviction following appellant Payne's successful appeal was constitutionally impermissible because the record of the second sentencing does not disclose "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." (*Pearce, supra,* at p 726.)

Our disposition of the above discussed issue renders unnecessary consideration of appellant Payne's contention that the possibility of a harsher sentence upon reconviction unduly chills the exercise of the right to appeal one's conviction granted by the Michigan Constitution of 1963, art 1, § 20.[8] We have carefully examined appellant Payne's

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[7] Justice Black's assertion, *infra,* p. ....., that no Justice dissented from Justice Dethmers' contrary handling of *Pearce* in *Olary* is misleading for two reasons. First, the two *Olary* dissenters did not reach the *Pearce* issue. Second, since Justice Dethmers first took great pains to distinguish *Pearce* in *Olary,* his subsequent interpretation of *Pearce's* requirements was clearly dicta and not controlling here.

[8] See Judge T. M. Burns' dissenting opinion below. 18 Mich App 42, 46.

other allegations of error and find them to be without merit.

Since this opinion was written, the case has been reheard and the records supplemented by additional statements by the trial judge. Nothing new, disposition-wise, has been added. The result remains the same.

The case is reversed and remanded to the Berrien county circuit court for resentencing in accordance with this opinion.

(s) Thomas M. Kavanagh

(s) Thomas Giles Kavanagh

(s) John B. Swainson

(s) G. Mennen Williams

35/April/1971

BEFORE THE ENTIRE BENCH

BRENNAN, J.

I agree with the Chief Justice's analysis of the *Pearce* decision.

I believe, however, that the United States Supreme Court was very, very wrong — dangerously, and illiberally wrong — in concluding that a harsher penalty could be imposed upon a defendant for "* * * conduct * * * occurring after * * * the original sentencing * * *."

Courts are empowered to mete out sentences for the conduct of which the defendant stands convicted. That conduct, and only that conduct, has been established factually in the manner required by constitutional due process.

Any other, subsequent, conduct with which the defendant has not been duly charged, and of which he had not been duly convicted according to the Constitution and laws of the State and the Nation simply *cannot* be made the basis for depriving a person of his liberty.

The Thirteenth Amendment makes the point perfectly and abundantly clear.

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." US Const, Am 13, §1.

To the extent that the *Pearce* case stands for the proposition that a harsher sentence, imposed on re-trial as a punishment for, or a deterrent to, the exercise of the right of appeal, it is good, sound constitutional law.

To the extent that *Pearce* ignores the plain command of the Thirteenth Amendment, it is a horrible mistake, and one which every state and Federal judge, endowed with the gift of conscience ought to call forceably to the attention of our constitutional superiors on the United States Supreme Court.

As to this case of *Payne*, I am satisfied that the candid statement of the circuit judge, made on the record at the time of re-sentencing is free of any taint of vindictiveness, and that the sentence should be upheld.

(s) Thomas E. Brennan

35/April, 1971
No. 52618-½

BEFORE THE ENTIRE BENCH

BLACK, J. (for affirmance)

ON REHEARING

Mr. Payne's appeal, granted January 21, 1970 (383 Mich 760), was assigned to then Associate Justice T. M. Kavanagh and duly submitted last year. December 16, 1970 the assignee Justice submitted to this then manned Court of six an opinion calling for reversal and resentencing in accordance with its tenor. That opinion, since withdrawn, will *not* appear in our reports.

In effort to attain a prompt decision, by the Court before whom the appeal had been submitted, the writer

dropped other work and drafted an opinion standing for affirmance. That opinion was delivered to the other Justices December 22, 1970. It *will* appear in our reports, *infra* beginning at ..... It communicates adequately my then and present view of Circuit Judge Byrns' eminently permissible and perfectly constitutional action when, upon full-fledged trial of Mr. Payne before a jury of another county than the county of indictment (ordered upon Mr. Payne's motion for venue change), Mr. Payne was convicted again of assault with intent to murder and sentenced (August 30, 1967) to 25 to 50 years imprisonment with credit allowed for time served and "earned"; distinguished from his original sentence by Judge Hadsell, in 1963, to 19 to 20 years imprisonment.

There is more to report. December 30, 1970 Justice T. M. Kavanagh "held" decision of the appeal, thus automatically eliminating Justice Dethmers from participation, the latter's term then being due for end in less than 48 hours. Next came a memorandum from newly elected Chief Justice Kavanagh dated January 22. With it he submitted to us a substituted opinion, likewise standing for reversal for resentencing. The memorandum concluded:

> "Since we are apparently split 3-to-2 on this case, we should consider resubmission to the entire present Bench in hopes of obtaining a sounder precedent. I would anticipate little inconvenience to the litigants in the event of resubmission, since the case was originally submitted on briefs."

The next internal event was that of submission by the present writer, to the other Justices, of a memorandum dated March 1. It reads:

> "What is introduced below repeats the resolution offered orally on December 30. This one is in writing, for reference in a forthcoming supplemental opinion. Counting procedurally on *Moon v. Maryland* [398 US 319; 26 L ed 2d 262] and *Odom v. United States* [..... US .....; 27 L ed 2d 122] I wish to have the Court resolve:

"That we request through the clerk submission by Judge Byrns of an affidavit supplying, 'in detail' as Judge Pugh did in *Moon v. Maryland* (June 8, 1970), his reasons for imposition of the August 30, 1967 sentence of Mr. Payne, so that this Court may determine whether, within Justice Stewart's allegedly 'ambiguous' opinion of *North Carolina v. Pearce*, 395 US 711, 23 L ed 2d 656, 'there was a retaliatory motivation on the part of the sentencing judge.'

"The new members of the Court will note that *Pearce* was decided June 23, 1969, nearly two years *after* Mr. Payne was sentenced the second time, and that USSC has twice since, over objection of Justice Douglas, refused to say that *Pearce* is retroactive in effect."

That resolution came to adoption by the Court March 2. On the same date the Court ordered — *sua sponte* — a rehearing of Mr. Payne's appeal. The order for rehearing concluded with provision that "the cause [be] submitted forthwith, without additional briefs or argument."

Pursuant to direction and on April 19 our clerk wrote Judge Byrns as follows:

"The Court has asked me to refer you to *North Carolina v. Pearce*, decided June 23, 1969 (23 L ed 2d 656); *Moon v. Maryland*, decided June 8, 1970 (26 L ed 2d 262) and *Odom v. United States*, decided November 9, 1970 (27 L ed 2d 122), and to the fact that you presided at Mr. Payne's Kent county trial in August of 1967 and were the second sentencing judge.

"The question in this Court for review on rehearing ordered March 2 is whether considering Mr. Payne's sentence by Judge Hadsell in 1962 and the somewhat greater sentence imposed by you August 30, 1967 following the Kent county trial, the second sentence was 'harsh' within the rule of *Pearce*. You will perceive how and why this question has arisen upon examination of *Pearce*, *Moon* and *Odom*.

"Your reasons given (prior to handing down of the 3 cited cases) for the sentence imposed August 30, 1967, appear in the transcript of sentence filed in your court on September 8, 1967. The Court wishes now that you prepare and submit an affidavit, procedurally as was submitted to the Supreme Court by Judge Pugh in the *Moon Case,* in order that the Court may determine whether there was or was not the vindictiveness to which the Supreme Court addressed itself in *Pearce.*

"In order that you may ascertain precisely how this was handled in *Moon* you are furnished herewith a copy of Judge Pugh's affidavit, sworn to by him October 1, 1969."

May 10 Judge Byrns responded by letter to the clerk, enclosing an affidavit attested by him. The affidavit is much the same as that which the United States Supreme Court accepted and acted upon, after grant of certiorari for review of *Moon v. Maryland,* June 8, 1970, 398 US 319, 90 S Ct. 1730, 26 L ed 2d 262. It reads:

"In accordance with the direction of the Supreme Court of Michigan in the above cause, I, Chester J. Byrns, being first duly sworn, say that:

"1. I am and have been since January, 1, 1967, one of the judges of the Second Judicial Circuit of Michigan (Berrien County).

"2. Leroy Payne, defendant-appellant in the above cause, pled guilty on December 14, 1962, before the Honorable Philip A. Hadsell, Circuit Judge, now retired, to the crime of assault with intent to murder, and was sentenced to 19-40 years.

"3. On June 15, 1967, I suppressed a confession of Mr. Payne, set aside his guilty plea and granted him a new trial based on his claim that improper means were used by the police to secure his confession which he claimed was involuntary.

"4. On August 4, 1967, I granted Mr. Payne's motion for a change of venue and transferred and heard the jury trial in Grand Rapids (Kent County), Mich-

igan, which resulted in a verdict of guilty of assault with intent to commit murder.

"5. During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes.'

"6. Unlike Judge Hadsell who had Mr. Payne before him for only a few minutes at the time of plea and again at sentence, I had the opportunity to observe and hear Mr. Payne who took the witness stand and who was examined and cross-examined extensively. Mr. Payne's story and claim in trial of not being at all involved in the crime was in direct conflict with what he told Judge Hadsell both at arraignment and at the plea of guilty where he not only admitted his crime but expressed sorrow and regret for it and showed thereby a remorse for his crime. At time of sentence Judge Hadsell said he believed Mr. Payne's claim of regret. At the time of sentencing by me on August 30, 1967, when given the opportunity to state anything he wished me to consider, Mr. Payne replied, 'Nothing.'

"7. At the jury trial before me Mr. Payne repeatedly denied under oath not only shooting Officer Victor Yost, but claimed under oath he was home with his wife and had while waiting earlier at church for his children at Sunday School gotten the gun used in the Yost shooting as security for a $3.00-loan to an unknown stranger and this gun and Payne's car were allegedly stolen the night of the shooting. This court believes this was a tissue of lies and so did the jury.

"8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence,

I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I receive.

"9. At the trial of People v. Lionel Bradford (Berrien circuit No. X-768, Michigan Supreme Court No. 52072), a co-defendant with Payne, who was found guilty by jury of assault with intent to murder Charles Plummer (who was shot along with Officer Yost but who was out of the country at the trial of Mr. Payne) Plummer testified (Bradford trial transcript pp 49, 50, and 180) that while he (Plummer) was wounded and lying on the ground, Mr. Payne came back and stood by the left fender of the car and deliberately fired right at him.

"10. Payne testified at Bradford's trial (February 4, 1963) that Lionel Bradford and Payne were driving a 1955 blue and white 2-door Pontiac on November 5, 1962 in the early morning hours. After having broken into a restaurant in South Bend, Indiana, and a clothing store near Benton Harbor, Michigan, Payne testified that he and Bradford were stopped by a police vehicle on M-139. Bradford had told Payne he 'would not be taken.' As they stopped, Bradford and Payne jumped from their vehicle and began firing at the two officers, hitting both of them.

"Payne remembered going back to one of the officers but couldn't recall exactly what then happened. Both men subsequently jumped into their car and fled, Payne giving his gun to Bradford in a ravine and returning home where he (Bradford transcript pp 45-60) was subsequently arrested.

"On September 2, 1965, nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he gave 'false testimony' at the Bradford trial. He said that the only reason he testified at that trial was due to fear of the police, that Bradford never ad-

mitted committing crimes, and that Bradford had denied being present when the officers were shot. Further, Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Bradford on either the date of the shooting or the day before.

"11. At the Payne trial before me, in far greater detail than would have been present in a plea of guilty, it was established before me beyond a reasonable doubt that Mr. Payne had participated in the deliberate, cold-blooded attack upon and wounding three times of Officer Yost under conditions that Mr. Yost could not properly defend himself, which I felt then and do now showed a depravity of mind.

"12. I had the details of the nature of the wounds and the medical fight to save Officer Yost's life from Mr. Yost and from his surgeon, Dr. Robert Reagan, as well as the residual and continuing damage to Mr. Yost, which Judge Hadsell on a plea of guilty would not have had.

"13. I had as a result of the trial and many facts brought out therein the conclusion that only by divine providence and not because of Mr. Payne was the life of Officer Yost saved.

"14. As stated at the time of sentencing, my increase in sentence to 25-50 years was not because the fendant asked for and got a new trial (which I granted) or a change of venue (which I granted), but because of the conditions and facts stated by me to Mr. Payne at the time of sentencing as well as the above matters which I do not believe were all known to Judge Hadsell.

"15. Further deponent says not.

[Subscribed, sworn, etc.]"

The next event of the appellate series was delivery to the other Justices, by the Chief Justice, of his third opinion for reversal. That was done under date of September 21. Presuming at this writing that this third review is due to be the opinion of the Court, I respond with the foregoing plus the ensuing presents this 14th day of October.

Between appropriate separating lines my 1970 opinion for affirmance, mentioned at the outset, is inserted here.

[Title of Court and Cause, October 1970 Term No. 33]

BEFORE THE ENTIRE BENCH (except Kelly, J.)

BLACK, J.

Defendant Payne demands on appeal that we compare his 1962 sentence upon plea of guilty in Berrien county, with his second sentence upon conviction by a jury in Kent county after change of venue, and that we find by the doubtful faird of 4-2-1-1 *North Carolina v. Pearce* (1969), 395 US 711 that the second sentence was unconstitutionally more "harsh" than the first.*

In corresponding vein we considered *Pearce* in *People v. Olary* (October 6, 1969), 382 Mich 559, 565-568, wherein no member of the Court dissented from Justice Dethmers' handling for us of the issue posed by *Pearce*. In *Olary* our rather unenthusiastic view of *Pearce* was summed up (p 566):

> "Then the rather amazing requirement seems to be expressed that, if a greater sentence is imposed after the second conviction, the sentencing judge must cause to be placed in the record his reasons for so doing, based on conduct of the defendant occurring after the

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* By plea of guilt to the charge of assault with intent to murder, and later by jury verdict, Mr. Payne's crime consisted of the cold-blooded shooting of police officer Yost as the latter approached Payne's automobile; the officer in a scout car having previously signaled the Payne car to a stop. Not one of Payne's 3 shots missed. One bullet crippled Yost's gun arm; hence he was unable to draw his gun and get into action. Payne and his companion drove away but were apprehended later. Yost was critically wounded and subjected to major surgery to save him. He managed to survive and testify years later.

first sentencing or, at least, on subsequent information coming to the judge after the first sentence."

Proceeding from *Olary* to today's question: I am unable to find that a majority of the Court, seated for determination of *Pearce,* committed the Court (if indeed there was *any* commitment beyond affirmance) to anything constituting a dependable precedent except that which, in full paragraphic context, was written by Mr. Justice Stewart (p 726):

> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

Justice T. M. Kavanagh, writing to reverse for resentencing, has plucked from the middle of *Pearce's* foregoing paragraph the second sentence thereof. Then, upon allegation and judgment that the sentence is grammatically "ambiguous," our Brother finds that the defendant's "identifiable conduct" must be "bad," and recorded that way, in order to satisfy the constitutional requirements of *Pearce's* quoted paragraph.

Now I cannot object legally to following the decisions of our superior, the United States Supreme Court, whatever we may think of such of its decisions as may dictate the criminal processes of the States. But I do of right protest the gratuitous insertion, in a short-of-majority opinion released by the Supreme Court, of an additional qualifying word or words which the endorsers of that opinion chose not to wedge in. And when that is attemptedly done by a subordinate Court bent on a this way or that way "interpretation" of an opinion of the Supreme Court, I not only object but except. Let us interpret and apply *all*

of Justice Stewart's words as they are, not as we might wish he had written them.

I shall presently return to this "identifiable (bad) conduct" view of Justice Stewart's opinion. For the merits of the constitutional question, however, the opinion of Division 3 (18 Mich App 42) expresses best the view I take of Judge Byrns' assiduous care of Mr. Payne's right as claimed by him under *Pearce,* and of the Judge's fulfillment of judicial duty in such regard. The following is adopted (pp 45, 46):

> "A trial affords more opportunity to hear all details, to observe and judge a defendant than does a summary plea proceeding, a fact noted by Judge Byrns. The trial judge noted the right of every citizen to seek appellate relief and the fact that obtaining such relief should in no way affect a subsequent sentence. The trial judge then stated that the sentence he was about to impose was not because defendant had appealed but by reason of the nature of the crime and impressions formed of defendant during 3 days of trial. The trial judge noted that the statute under which defendant was convicted authorized a life sentence or any term of years, and except for defendant's past history (poor family background, good school, service and prison records), a life sentence would have been imposed."*

Judge Byrns' "reasons," for the sentence ordered after the jury trial (25 to 50 years with allowed credit for time served and earned "good time"), compared with the sentence meted out years before on Mr. Payne's plea of guilt (19 to 40 years), need no expatiation. Read in continuant context, the Judge's discourse portrays something more than due care in effort to conform with the rule of *Williams v. New York* (1949), 337 US 241, 245 which, later, was expounded in *Pearce* at 723-726.

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* The complete text of that which is necessary to determine whether Judge Byrns did or did not supply the record, required by Justice Stewart's opinion as quoted, appears in Justice T. M. Kavanagh's opinion, ante at .....

From that conclusion I turn to the 3 federal *appellate* decisions (not District Court opinions or conceded dicta) which Justice T. M. Kavanagh admits are opposed to the application he, per the above, would make of the quoted "ambiguous" sentence. The 3 are *United States v. Kienlen* (CCA 10, 1969), 415 Fed 2d 557; *United States v. Gross* (CCA 8, 1969), 416 Fed 2d 1205 and *United States v. Barash* (CCA 2, 1970), 428 Fed 2d 328.

Pick up the first, *Kienlen*. The unanimous opinion there provides plain reason why the 11 federal circuits are thus far loath to speed ahead of *Pearce*. Read first the sentencing judge's reasons for stepping up Kienlen's sentence (pp 559-560) from 12 years to 18 years, in array with those which Judge Byrns declared upon sentence of Mr. Payne. Doing so, note the striking emphasis upon judicial consideration of *information gained by and upon actual trial* of the facts, compared with that which in each instance was provided by the earlier plea. Finally, consider Chief Judge Murrah's conclusion of *Kienlen* — for the Court (p 560):

> "After a brief colloquy, he [the sentencing judge] further noted, 'I want it clearly understood that what I have said with respect to increasing the sentence or, rather, imposing a more severe sentence than I had before, is not to be taken by anyone as punishment for the exercise of constitutional rights by this defendant.'
>
> "In our judgment, this meets the Pearce standard. Naturally, the statement that the trial judge was not penalizing the defendant for exercising his constitutional right to appeal is not conclusive. But it is indicative of the sentencing climate. The decision was clear and rational. Finding this sentence altogether compatible with Pearce, we need not consider the possible retroactivity of Pearce. See Moon v. Maryland, cert. granted 395 US 975, 89 S Ct 2135, 23 L Ed 2d 764 (1969) on the issue of Pearce's retroactivity."

The foregoing brings to the fore that which the courts of the States must ever bear in mind; that since there is no compulsion, they of right and good sense should never

undertake to gallop ahead of the United States Supreme Court, as legal skirmishers, into the uncertain and dangerous brambles of federal criminal justice. Subordinates never know whether that top Court of a State or of the Nation will provide support later; a fact learned anew when our opinion of *People v. Charlie Lee Woods* (cited post), was held up from February 14 to August 4, 1969, awaiting *Jenkins v. Delaware* (1969), 395 US 213.

Here our constitutional position, vis-a-vis a decision of the United States Supreme Court we are warned to follow, should not be forgotten as all view the occasional error of proceeding ahead of our superior as federal questions arise, say as chronicled anent California in the separate opinion of *People v. Taylor* (1970), 383 Mich 338, 367-372. "Made in Washington," as cynics currently describe the products of Congress, applies as truly but more respectfully to the decisions of the United States Supreme Court. We need not buy them nor employ them, unless they bear that warranty of fitness which under Article VI is made negotiable by the unreserved endorsements of 5 or more of the Justices. *Pearce* is not so endorsed.

Ranking surely with Chief Justice Marshall's mighty phrase, admonishing that "We must never forget, that it is a *constitution* we are expounding." (*McCulloch v. State of Maryland* (1819), 17 US at 407), Justice Adams has written for us an equally enduring deterrent warning. Appearing in *In Re Apportionment of Legislature* (1964), 372 Mich 418, 473, it is that he did not "conceive it to be the proper duty or function of this Court to attempt to outrun the Supreme Court of the United States." Having admired crescently the penetrating omniscience of my Brother's thought in such regard, due respect has since been paid thereto. See *Muskegon Prosecuting Attorney v. Klevering* (1966), 377 Mich 666, 672; *People v. Mallory* (1967), 378 Mich 538, 584,* and *People v. Charlie Lee*

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* My footnote in *Mallory* concluded:

"It is better, say I, that a subordinate court risk direct reversal than risk indictment and conviction for having predicted by a soothsayer's judgment what ultimately does not come to pass."

Woods (1969), 382 Mich 128, 129. On the last cited occasion the *entire* Court, Justices T. M. Kavanagh and Adams included, joined in the deserving accolade.

The issue arising from Mr. Payne's 1967 sentence may be summarized best by calling attention to the Supreme Court's most recent duel over these allegedly "harsh" second sentences to imprisonment. That duel appears in 5-1-1-1 *Moon v. State of Maryland* (June 8, 1970), ... US ....., ..., where the writ theretofore granted *Moon* was dismissed "as improvidently granted." Five members of the Court declared that "the dispositive development is that counsel for the petitioner has now made clear that there is no claim in this case that the due process standard of *Pearce* was violated." That conclusion was reached upon strength of Moon-counsel's statement renouncing any claim "that Judge Pugh was vindictive."

If such is to be the "dispositive development" of cases as at present bar, then let it be noted that nowhere in the brief of Mr. Payne does there appear the slightest suggestion or hint that Judge Byrns was "vindictive"; also that this case was received on briefs with oral argument waived. Again, is it not in order that this Court of a State should not attempt to manufacture more rights from the Bill of Rights, and that it should attend in that regard the leadership of the United States Supreme Court?

No other question posed for review requires discussion. I vote to affirm.

On rehearing there is no more that needs saying than this:

First: The Supreme Court, having granted Mr. Moon's petition for certiorari, accepted and acted affirmatively upon sentencing Judge Pugh's October 1, 1969 affidavit. That affidavit, a copy of which I have attached as an appendix so that concerned outstate as well as instate counsel may compare it conveniently both with Judge Byrns' sentencing statement (ante at .....) and Court-requested affidavit, persuaded the Supreme Court that Judge Pugh therein had set forth "objective information concerning identifiable conduct on the part of the defendant occurring

after the time of the original sentencing proceeding.", and that the writ of certiorari granted Mr. Moon therefore should be dismissed as improvident (*Moon* at 320, 321).

Second: In *Odom v. United States*, November 9, 1970 ..... US ....., 91 S Ct ....., 27 L ed 2d 122, the Supreme Court determined to employ sentencing Judge McRae's order of July 1, 1970, the order having made "it clear that the greater severity of the second sentence was based on conduct on the part of the petitioner occurring after the time of the original sentencing proceeding, and that the new information was specifically referred to at resentencing." (*Odom* at .....). Again, the writ was dismissed as improvidently granted.

My question is: Why is this professedly USSC-devoted Court of a State unwilling to accept sentencing Judge Byrns' even more convincing statement at sentence (*ante* at .....), and his equally convincing affidavit (which last the Court itself requested), as equally or more persuasive that something quite aside from "retaliatory motivation" led to Payne's somewhat more severe sentence of August 30, 1967?

Is it not true that here, as pointed out by the writer in his 1970 opinion (*ante* at .....), that there is not "the slightest suggestion or hint in the brief of Mr. Payne, that Judge Byrns was 'vindictive'."? Clear it is that Michigan trial court judges are in for "vindictive" discipline if they do not go easy on vicious professionals like Leroy Payne and Lionel Bradford. Both deliberately stopped to shoot at the officers, one of whom was grievously wounded, wholly helpless, and prone on the pavement. And all these facts could not possibly have been known to sentencing Judge Byrns until Bradford and Payne had been separately tried. (For appellate review of Bradford's conviction, see *People v. Bradford*, 10 Mich App 696; leave to appeal denied September 30, 1968; 381 Mich 778).

To conclude:

The projected issue of retroactivity of *Pearce* is no more present now, in this case of *Payne*, than it was in *Moon* and *Odom* when each was decided. Without thought

of attempted usurpation of the Supreme Court's exclusive prerogative, I suggest that we may accept provisionally the ultra-liberal hope that the quoted portion (ante at .....) of *Pearce* will some day be held retroactive, and yet properly find under *Moon* and *Odom* that Judge Byrn's sentencing statement and subsequent affidavit, like that of Judge Pugh in *Moon*, has left Mr. Payne's appeal both bootless and improvident. I conclude as the Supreme Court did in *Odom*:

> "Since it is now apparent that this case does not present the issue of the retroactivity of *North Carolina v. Pearce, supra*, the writ is dismissed as improvidently granted."

Believing that this Court has no honorable right to usurp the statutorily confided exclusive discretion of trial court judges in the sentencing of convicted felons, I adhere to the first premise of *Pearce's* immediate father (*Williams v. New York* [1949], 337 US 241, 245; 69 S Ct 1079; 93 L ed 1337), distilled as it was by *North Carolina v. Pearce* at 723:

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' "

As before, I vote to affirm.

(s) Eugene F. Black

APPENDIX

(Copy of Judge Pugh's affidavit, mentioned by the Supreme Court in Moon v. Maryland, June 8, 1970, 26 L ed 2d 262, 264)

RESPONDENT'S EXHIBIT "A"

In The Circuit Court for Montgomery County, Md.

Nos. 7639 and 7640

State of Maryland

vs.

Dennis Mullene Moon

At the request of the Attorney General of Maryland, made to me on the 30th day of September, 1969, I do hereby make the following statement:

On June 6th and 7th, 1966, I presided over the jury trial of Dennis Mullene Moon who was convicted under two indictments, (No. 7639 and No. 7640) with the crimes of assault with intent to kill and murder (No. 7639 Criminals) and robbery with a deadly weapon and grand larceny (No. 7640 Criminals). At the request of the defendant's attorney, sentence was imposed after the return of the verdict, no request for a presentence investigation was made because such was not desired by defendant's attorney. At the sentencing I was informed that another Judge of this Court had sentenced the defendant to twelve years in the penal institution after his conviction of the crime of robbery with a deadly weapon. There was no trial under Criminals No. 7639 charging assault with intent to kill and murder, at the first trial. I was also aware of the fact that the defendant was given a retrial as a result of the decision of the Maryland Court of Appeals in the case of Schowgurow vs. State, 240 Md. 121. I sentenced the defend-

ant for his conviction of robbery with a deadly weapon, under Count One of the Indictment in Criminals No. 7640 to a period of twenty years, and for a period of ten years under Count Number Six of this indictment the ten year sentence to be suspended on condition that when the defendant is released from his sentence under the First Count that he will remain on good behavior and not get in any trouble any more. I sentenced the defendant to ten years under Count No. One in Criminals No. 7639, charging assault with intent to kill and murder, this latter sentence to be suspended on condition that he remain on good behavior when he is released from his sentence under the First Count in Criminal No. 7640. Credit was also given for the time previously served by the defendant awaiting retrial from June 2, 1964, to June 7, 1966, (2 years and 5 days). At the time of sentencing, I took into consideration the following facts:

1. The defendant bludgeoned the victim with a pipe rendering her unconscious for a long period of time, causing her to be hospitalized for four days. She had a complete loss of memory of the events of the crime. The attending physician testified that she had head and eye injuries, that she was rather confused, disoriented, suffering from headaches, that she had deep lacerations over her left eyebrow with marked hemorrhage around the eye, contusions behind the right ear, abrasions of the left knee, a concussion, cerebral concussion, that she was under a doctor's care until July 6, 1964, a period of forty-nine days that she was still suffering from the affects of her injuries on the date of trial when she broke down in tears on the witness stand.

2. The defendant stole the sum of $400.00 from the victim, whom he knew, by means of his attempt to kill her, to prevent his identification by her.

3. The defendant was tried and convicted of another offense at his trial, the crime of assault with intent to kill and murder, which sentence of ten years I suspended on condition that he remain on good behavior when he is released under the sentence of twenty years.

4. The defendant had previous convictions of housebreaking and larceny for which he was sentenced to one

year in Ft. Leavenworth, Kansas, in 1959, a conviction under the Dyer Act in Carson City, Nevada, in 1961 for which he was sentenced to three years; a conviction on April 13, 1961 under Title 18, Sec. 2312 in Las Vagas, Nevada, for which he was given three (3) years.

5. The defendant took the stand and under oath denied that he had struck the defendant. When his lawyer called to the defendant's attention that he took the stand in the previous trial and admitted hitting the victim, the defendant said he did not remember testifying that he hit the victim at the first trial, which I did not believe, and I was convinced that he had perjured himself at this sentencing which I considered as identifiable misconduct on his part occurring after the time of the original sentence.

6. That on June 8, 1966, I refused to sign an order to have the defendant transferred from the Maryland Penitentiary to the Patuxent Institution for his evaluation as to whether or not he was a defective delinquent under Article 31B, Section 5 of the Code of Laws of Maryland stating that "The defendant has been sentenced to twenty years in the Penitentiary plus two ten year sentences which were suspended and the Court is of the opinion that the sentence of twenty years plus the two ten year suspended sentences is adequate and therefore no proceedings should be filed under the defective delinquency statute."

7. I had not read the transcript of the first trial and did not preside at the first trial, therefore did not know what facts and circumstances the first Trial Judge took into consideration in sentencing the defendant to twelve years.

Respectfully submitted,

James H. Pugh,
Judge of the Circuit Court for
Montgomery County, Maryland

Subscribed and sworn to before me this 1st day of October, A.D., 1969.

Betty Ruth Belcher,
Notary Public, Maryland

(Seal)

35/April 1971
[No. 52618½]

BEFORE THE ENTIRE BENCH

ADAMS, J.

ON REHEARING

I concur with that portion of Justice Black's opinion which he designates as his 1970 opinion.

(s) Paul L. Adams

35/April 1971

BEFORE THE ENTIRE BENCH

WILLIAMS, J. (concurring)

I concur with the Chief Justice's analysis of *Pearce* and the fact it is controlling. Personally, however, I think Justice White's opinion makes better sense.

(s) G. Mennen Williams

APPENDIX B — OPINION OF THE COURT OF APPEALS

(Filed June 25, 1969)

BEFORE: Quinn, P.J., T. M. Burns and Holbrook, J.J.

QUINN, P.J.

December 14, 1962, defendant, represented by counsel, pleaded guilty to a charge of assault with intent to commit murder, CL 1948, § 750.83 (Stat Ann 1962 Rev § 28.278). Thereafter, defendant was sentenced to prison for a term of 19 to 40 years. Judge Hadsell presided at the plea and sentence. Judge Hadsell's term of office expired January 1, 1967 and he was replaced by Judge Byrns. 378 Mich (v).

Following a remand from the Court of Appeals for that purpose, a hearing was held June 15, 1967 to determine the voluntariness of confessions, admissions and statements against interest made by defendant prior to his plea. As a result of the hearing, the trial court suppressed all confessions, admissions and statements against interest, set aside the plea, vacated sentence and remanded the case for preliminary examination.

At the conclusion of the examination, defendant was bound over for trial. His motion for change of venue was granted, and he was tried before Judge Byrns and a jury in Kent county. August 24, 1967, the jury returned a verdict of guilty as charged. Thereafter defendant was sentenced to prison for a term of 25 to 50 years, with credit for time already served. His appeal raises 5 issues, 4 of which do not merit discussion.

Defendant contends it was reversible error for Judge Byrns to impose a more severe sentence than did Judge Hadsell. In *People v. Poole* (1967), 7 Mich App 237, this Court held such action was not error. In *People v. Mulier* (1968), 12 Mich App 28, this Court held such action was reversible error. The cases are not in conflict, however; factual differences permit each pronouncement to stand without encroachment on the other. In *Poole*, a different judge imposed the harsher sentence and reason for such action appeared in the record. In *Mulier*, the same judge imposed the harsher sentence for no reason apparent on the record. The distinction is noted in *Mulier* at page 33:

> "To allow the imposition of a harsher sentence after a rehearing, where the offense, the plea, and the sentencing judge are the same as in the prior proceeding and the record is barren of any grounds tending to support the harsher sentence, unduly infringes upon the constitutional right of appeal."

This case of Payne is stronger than *Poole, supra*. In *Poole*, both convictions were by plea. In Payne, the first conviction was by plea and the second was by jury verdict. A trial affords more opportunity to hear all details, to observe and judge a defendant than does a summary plea

proceeding, a fact noted by Judge Byrns. The trial judge noted the right of every citizen to seek appellate relief and the fact that obtaining such relief should in no way affect a subsequent sentence. The trial judge then stated that the sentence he was about to impose was not because defendant had appealed but by reason of the nature of the crime and impressions formed of defendant during 3 days of trial. The trial judge noted that the statute under which defendant was convicted authorized a life sentence or any term of years, and except for defendant's past history (poor family background, good school, service and prison records), a life sentence would have been imposed.

On this record, we conclude that we do not have supervisory control over punishment within the provisions of the statute, *Poole, supra* and that *Mulier, supra,* is inapplicable.

Affirmed.

ORDER AFFIRMING JUDGMENT OF BERRIEN COUNTY CIRCUIT COURT
(Filed July 28, 1969)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 25th day of June in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable

Timothy C. Quinn
Presiding Judge

Donald E. Holbrook
Thomas M. Burns
Judges

This cause having been brought to this Court by appeal from Berrien County Circuit Court, and having been ar-

gued by counsel, and due deliberation had thereon, it is now ordered by the Court, that the judgment of the Berrien County Circuit Court be and the same is hereby affirmed.

Judge Thomas M. Burns, dissents.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 17th day of July in the year of our Lord one thousand nine hundred and sixty-nine.

(s) Ronald L. Dzierbicki
Clerk

DISSENTING OPINION

BEFORE: Quinn, P.J., T. M. Burns and Holbrook, J.J.

T. M. Burns, Dissenting

I concur with my brothers' disposition of all issues raised in this appeal save the question of whether the imposition of a more severe sentence upon retrial after the defendant gained reversal of his prior conviction on constitutional grounds is permissible. Upon this question of more severe sentence on retrial, I must respectfully dissent.

The majority here relies on an extremely tenuous distinction between the cases of *People v. Poole,* (1967), 7 Mich App 237, and *People v. Mulier* (1968), 12 Mich App

28, based on the fact that here in *Poole, supra,* the judge on retrial was different than the judge in the original trial while in *Mulier, supra,* the same judge presided over both trials. Although this seeming distinction has been noted recently in *People v. Parm* (1968), 15 Mich App 303, it is a distinction without real meaning or substance.

Further in *Poole, supra* the question of infringing upon the constitutional right of appeal was not present. In *Poole* the defendant *pled guilty* then made a motion for new trial on the ground that he had not been informed of his right to counsel at the arraignment. Even though the defendant had been represented by counsel at the arraignment, the trial judge granted motion for new trial and the defendant pled guilty again. The question of imposing a harsher sentence for exercising the right of appeal as granted by the Constitution of this state was not raised. Const. 1963 art 1, § 20.

The majority mentions justification in the record for increasing the sentence upon retrial present in *Poole* and here which was not present in *Mulier* and I suppose in *Parm, supra.* After a careful review of the record in this case I fail to find anything that might legitimately be taken into consideration in sentencing which was not known to the judge at the first sentencing hearing in March of 1963. The self-serving declaration of the sentencing judge that he was not imposing a harsher sentence because defendant appealed and that he was giving the defendant credit for time served does not change the practical realities of the situation.

The effect of raising the sentence from 19 to 40, to 25 to 50 with credit for time served when the defendant has already served almost 5 years is, at least, to deny him credit for time served which is impermissible under *Moore v. Parole Board* (1967), 379 Mich 624, which reversed 4 Mich App 261. CLS 1961, § 769.11a (Stat Ann 1965 Cum Supp § 28.1083(1)).

The increased sentence which was imposed upon the defendant here is clearly impermissible under the recent United States Supreme Court case of *North Carolina v. Pearce* (No. 413), *Simpson v. Rice* (No. 418) (1969) 37 LW 460, even though the opinion of the court in that case

which was signed by only three justices would permit a harsher sentence under certain conditions.

Justice Stewart speaking for himself, Justice Brennan and Chief Justice Warren said at p 4605:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal". (Emphasis added).

There is no such, ". . . objective information concerning identifiable conduct on the part of the defendant after the time of the original sentence (,)" in the record on appeal. Lacking this affirmative showing, a more severe sentence cannot be allowed on retrial. *North Carolina v. Pearce* (No. 413), *Simpson v. Rice* (No. 418), supra, p 4605.

Yet, I would join Justices Douglas and Marshall, and Justice Harlan, who in separate opinions go beyond the holding of the Court, and say that since the Court has made the double jeopardy clause of the Fifth amendment applicable to the states in *Benton v. Maryland* (No. 201) (1969) 37 LW 4623, a harsher sentence may not be imposed

upon retrial after a successful appeal. *North Carolina v. Pearce* (No. 413), *Simpson v. Rice* (No. 418), *supra.*•

The majority here, as in *North Carolina v. Pearce, supra,* express the view as stated in *Poole, supra,* at 242 said:

> "Defendant knowingly took a risk in seeking a new trial and should not be heard to complain because a new minimum sentence may increase the time he might serve."

The effect of the majority's opinion here is to say to a defendant whose constitutional rights have been violated at trial that you may vindicate your rights, but if the appeals court reverses the conviction, you may be given a higher sentence which will cover the time you were illegally in prison even though you are "given credit for time served". The majority opinion in this respect, is declaring their adherence to the "total waiver" theory of double jeopardy expressed in *Stroud v. United States* (1919), 251 US 15, 18 (40 S Ct 50, 64 L ed 130), which has been substantially undercut, if not totally placed in disrepute, by *Green v. United States* (1962), 355 US 184 (78 S Ct 221, 2 L ed 199). *North Carolina v. Pearce, supra,* (concurring Justices Douglas and Marshall, also Justice Harlan concurring and dissenting).

In *Green v. United States* (1962), 355 US 184 (78 S Ct 221, 2 L ed 199), the Court enunciated the "limited waiver" doctrine for interpreting the double jeopardy provisions of the Fifth Amendment. Under this doctrine a defendant only waived the bar against double jeopardy by appealing his conviction to the extent necessary for his purposes. The effect of this doctrine is to forbid the retrial of defendant for a defendant for a greater offense than he was originally convicted of as an unconscionable premium upon a successful appeal.

•This court held in *People v. Bower* (1966) 3 Mich App 585, 589 that the 5th Amendment double jeopardy clause was applicable through the 14th Amendment.

Justice Douglas speaking of the effect of *Green* on the practice of allowing a harsher sentence on retrial after an appeal says:

> "The theory of double jeopardy is that a person need run the gauntlet only once. The gauntlet is the risk of the range of punishment which the State or Federal Government imposes for that particular conduct. It may be a year to 25 years, or 20 years to life, or death. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. And the fact that he takes an appeal does not waive his constitutional defense of former jeopardy to a second prosecution. *Green v. United States,* 355 U.S. 184, 191-193.

In the *Green* case, the defendant was charged with arson on one count and on a second count was charged either with first degree murder carrying a mandatory death sentence, or second degree murder carrying a maximum sentence of life imprisonment. The jury found him guilty of arson and second degree murder but the verdict was silent as to first degree murder. He appealed the conviction and obtained a reversal. On a remand he was tried again. This time he was convicted of first degree murder and sentenced to death — hence his complaint of former jeopardy. We held that the guarantee of double jeopardy applied and that the defendant, having been "in direct peril of being convicted and punished for first degree murder at his first trial" could not be "forced to run the gauntlet" twice. 355 U.S. at p. 180.

It is argued that the case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. "It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments, or allows the court or jury to fix different punishments for the same crime." *California v. Hender-*

son, 60 Cal. 2d 482, 497, 35 Cal. Rptr. 77 (1963) (Traynor, J.).

From the point of view of the individual and his liberty, the risk here of getting from one to 15 years for specified conduct is different only in degree from the risk in *Green* of getting a life imprisonment or capital punishment for specified conduct. *North Carolina v. Pearce, supra*, at p. 4606.

Justice Harlan in a very scholarly opinion supports Justice Douglas' reliance on *Green*. Justice Harlan says — pp 4611-4613:

"Given *Benton*, it is my view that the decision of this Court in *Green v. United States*, 355 U. S. 184 (1958), from which I dissented at the time, points strongly to the conclusion, also reached by my Brother Douglas, ante, at ....., that the Double Jeopardy Clause of the Fifth Amendment governs both issues presently decided by the Court. Accordingly, I join in Part I of the Court's opinion, and concur in the result reached in Part II, except in one minor respect.

Green v. United States, supra, held in effect that a defendant who is convicted of a lesser offense included in that charged in the original indictment, and who thereafter secures reversal, may be retried only for the lesser included offense. Mr. Justice Frankfurter observed, in a dissent which I joined, that:

"As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly [increased] . . . punishment . . . ." Id., at 213.

Further reflection a decade later has not changed my view that the two situations cannot be meaningfully distinguished.

"Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an 'implied acquittal' of the greater offense, ibid., applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment. Most significantly, perhaps, in each case a contrary rule would place the defendant considering whether to appeal his conviction in the same 'incredible dilemma' and confront him with the same 'desperate choice.' Id., at 193. His decision whether or not to appeal would be burdened by the consideration that success, followed by retrial and conviction, might place him in a far worse position than if he remained silent and suffered what seemed to him an unjust punishment. In terms of *Green*, that the imposition of a more severe sentence on retrial is a matter of pure *chance*, rather than the result of purposeful retaliation for having taken an appeal, renders the choice no less 'desperate.'

"If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend 'sentences' — as distinguished from 'offenses' — for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one. See *United States v. Benz*, 282 U.S. 304, 306-307 (1931); *Ex parte Lange*, 18 Wall. 163, 168, 173 (1873).

"The Court does not suggest otherwise, but in its view, apparently, when the conviction itself and not merely the consequent sentence has been set aside, or when either has been set aside at the defendant's behest, the 'slate has been wiped clean,' *ante*, at 9, and the Double Jeopardy Clause presents no bar to the imposition of a sentence greater than that originally imposed. In support of this proposition, the Court relies chiefly on two cases, *Stroud v. United States*, 251 U.S. 15 (1919), and *United States v. Ball*, 163 U.S. 662 (1896). I do not believe that either of these cases provides an adequate basis for the Court's seemingly incongruous conclusion.

"*Stroud v. United States, supra*, held that a defendant who received a life sentence for first degree murder could, upon securing a reversal of the conviction, be retried for first degree murder and sentenced to death. However, the opinion does not explicitly advert to the question whether the Double Jeopardy Clause bars the imposition of an increased punishment, and an examination of the briefs in that case confirms the doubt expressed by the Court of Appeals in *Patton v. North Carolina*, 381 F. 2d 636, 644 (1967), whether this question was squarely presented to the Court. Assuming that *Stroud* stood for the proposition which the majority attributes to it, that decision simply cannot be squared with the subsequent decision in *Green v. United States*, 355 U.S. 184 (1958), See, *id.*, at 213; *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963).

"The Court does not rest solely on this ambiguous and doubtful precedent, however. Its main point seems to be that to limit the punishment on retrial to that imposed at the former trial 'would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball*,' 163 U.S. 662 (1896), and its progeny. *Ante*, at 9-10.

"*Ball* held, simply, that a defendant who succeeds in getting his first conviction set aside may there-

after be retried for the same offense of which he was formerly convicted. This is indeed, a fundamental doctrine in our criminal jurisprudence, and I would be the last to undermine it. But *Ball* does not speak to the question of what *punishment* may be imposed on retrial. I entirely fail to understand the Court's suggestion, unless it assumes that *Ball* must stand or fall on the question-begging notion that, to quote the majority today, 'the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean', *Ante*, at 9.

"In relying on this conceptual fiction, the majority forgets that *Green v. United States, supra,* prohibits the imposition of an increased punishment on retrial precisely because convictions are usually set aside only at the defendant's behest, and not in spite of that fact. 355 U.S., at 193-194; *supra*, at 3: the defendant's choice to appeal an erroneous conviction is protected by the rule that he may not again be placed in jeopardy of suffering the greater punishment not imposed at the first trial. Moreover, in its exaltation of form over substance and policy, the Court misconceives, I think, the essential principle of *Ball* itself:

" 'While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' *United States v. Tateo*, 377 U.S. 436, 466 (1964).

"To be sure, this societal interest is compromised to a degree if the second judge is forbidden to impose a greater punishment on retrial than was meted out at the first trial. For example, new facts may develop between the first and second trial which would, as an initial matter, be considered in aggravation of sentence. By the same token, however, the prosecutor who was able to prove only second degree murder at the former trial might improve his case in the interim and acquire sufficient evidence to prove murder in the first degree. In either instance, if one views the second trial in a vacuum, the defendant has received less punishment than is his due. But in both cases, the compromise is designed to protect other societal interests, and it is, after *Green*, a compromise compelled by the Double Jeopardy Clause.

"I therefore conclude that, consistent with the Fifth Amendment, a defendant, who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed. Because the Double Jeopardy Clause has now been held applicable to the States, *Benton v. Maryland, supra*, I would affirm the judgment of the Court of Appeals in No. 418, and vacate and remand in No. 413, so that respondent Pearce may finish serving his first, valid sentence."

It is not necessary to premise this case, however, upon the double jeopardy provision of the Fifth Amendment for that is at best only a minimum protection or bar. This Court said in *People v. Mulier, supra*, p 33, that a more cogent ground for decision would be on the basis of protecting the right of appeal which is granted by the Michigan Constitution, Chief Judge Lesinski, speaking for the Court in *People v. Mulier, supra*, said at 32-33:

"An enlightened concept of the protections which the law affords the accused at each step of the judicial process has caused the Courts to re-examine the inherent fairness of the distinctions previously drawn to justify the imposition of harsher sentences under almost any set of circumstances."

I believe that the imposition of a greater sentence or the same sentence without credit for time served, upon retrial of a defendant who has vindicated his constitutional rights by exercising his right of appeal, unduly chills the right of appeal.

In *People v. Henderson, supra,* p. 492 the Court went on to hold that California's constitutional provision against double jeopardy prevented the imposition of the death penalty upon defendant after reversal of a judgment sentencing him to life imprisonment.

> "A defendant's right to an appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

See *People v. Ali* (1967), 57 Cal Rptr 348 (424 P 2d 932), where the same court applied the *Henderson* rationale to a situation where defendant has been sentenced to concurrent terms at the original trial and to consecutive terms after a successful appeal and subsequent reconviction for the same offense.

In *State v. Wolf* (1966), 46 NJ 301 (216 A 2d 586), 12 ALR 3d 970, where the Supreme Court of New Jersey held that the prosecution was barred from seeking the death penalty at the new trial; the defendant received a life sentence upon his conviction for murder in the first degree and the death sentence on retrial after an appeal. The Court reasoned that since the state granted a convicted murderer the unqualified right of appeal, standards of procedural fairness forbid limiting the right by requiring the defendant to barter with his life for the privilege of exercising it.

In *State v. Turner* (1967), 247 or 301 (429 P 2d 565, 570, 571), the Supreme Court of Oregon, following the lead taken in *State v. Wolf, supra,* and *People v. Henderson, supra,* promulgated the following procedural rule to be applied in all cases to assure the criminal defendant the unfettered exercise of his statutory right of appeal:

> "After an appeal of post-conviction proceeding has resulted in the ordering of a retrial for errors other than an erroneous sentence, * * * and the defendant has again been convicted, no harsher sentence can be given than that originally imposed. If the initial sentence was incarceration, the defendant subsequently cannot be sentenced to any longer term than the time still to be served upon his initial sentence."

This is the rule which I would have this Court adopt in this case. The majority here would force a defendant whose constitutional rights had been violated in a way which resulted in an invalid conviction to suffer this violation for the fear that on retrial he would be given an even greater penalty. I do not believe that such a price can be exacted for invocation of a right. I would reverse and remand for resentencing with the sentence imposed at the first trial as a maximum and with credit for time served.

APPENDIX C — ARRAIGNMENT TRANSCRIPT

(Filed January 3, 1963)

(1)

People of the State of Michigan

vs.

LeRoy Payne, Respondent

Case No. X-751 Dated December 14, 1962
Action: Arraignment

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Frederick Lake, Assistant Pros. Atty.
Atty. Philip A. Brown, Atty. for Respondent

MR. LAKE: May it please the court, this is the matter of the People of the State of Michigan versus LeRoy Payne, here on an information charging the crime of assault with intent to commit murder. This is the Court's Docket X-751.

Mr. Payne is represented in court by his attorney, Mr. Brown, of St. Joseph, and the record will show that a preliminary examination was had on this charge, and in the Municipal Court for the City of Benton Harbor, and that the respondent was bound over to this court to answer to this information.

(2)

Mr. Brown, will you waive further reading of this information at this time?

MR. BROWN: Respondent waives further reading of the information at this time, your Honor.

I have gone over the elements of this offense with the respondent quite extensively. I have explained to him his various rights; his right to a jury trial; his right to plead guilty to the offense; his right to plead not guilty. I have also explained to him the maximum penalty, upon a conviction, of this crime.

We have had a preliminary examination on this charge, and the People have shown probable cause here, and he was bound over.

I have also explained to him that regardless of any promises of any kind, of leniency, as to entering a plea of guilty, this was in no one's control but the court, and that the maximum penalty was life, or any term of years, for a conviction under this charge, and I have explained, as I said, the various rights to the respondent, under the constitution and the statutes, and the respondent has advised me that he wishes to tender a plea of guilty to this offense at this time.

THE COURT: Mr. Payne, you have heard what your counsel has said? Is that a correct statement (3) of the facts?

THE RESPONDENT: Yes, sir.

THE COURT: In this case, due to the publicity that I have read, which may or may not be true, I want to be very careful that you understand exactly what you are

doing, and that you are not doing it because of any reason other than that you are guilty.

I take it from the examination and from your counsel that the People can prove you guilty of this charge beyond a reasonable doubt, without any use of an alleged confession that was included in the case, as I understand it. Is that correct?

THE RESPONDENT: Yes.

THE COURT: In other words, I am informed that there was a positive identification by the victim, by Victor Yost, or another officer that was with him, of your identification. Do you understand that to be the fact?

THE RESPONDENT: Yes, sir.

THE COURT: And is that the fact?

THE RESPONDENT: Yes, sir.

THE COURT: I also have been informed that you signed a confession to this crime, but that before you signed it you received some physical harm at the hands (4) of somebody, but that you have stated that you do not wish that to be considered in this matter, is that correct?

THE RESPONDENT: Yes, I'm pleading guilty because I am guilty, and I'm sorry about it.

THE COURT: That comes up later. If the court is satisfied to accept your plea of guilty, then that part about your reformation, if any, comes at a later date, and is taken into consideration by the court in passing sentence, or possibly taken into consideration. There is nothing that you can be sure of, if your plea is accepted, except that you'll be sentenced in some manner by the court for this crime, to which you are pleading guilty.

I don't know as you have stated on the record that you do plead guilty. Is that true?

THE RESPONDENT: I do plead guilty, sir.

THE COURT: Did you, on the 5th day of November, 1962, at the City of Benton Harbor, in Berrien County, Michigan, feloniously assault Victor Yost with a gun, as I understand it — although it isn't so alleged — and that you then and there intended to kill and murder?

THE RESPONDENT: Yes.

THE COURT: Nobody has promised you leniency or

threatened you, to get you to plead guilty? (5) And you are pleading guilty because you did do that?

THE RESPONDENT: I have been threatened, sir, but it's not because of these threats that I'm pleading guilty.

THE COURT: You had threats, but you are not pleading guilty because you were threatened, is that correct?

THE RESPONDENT: Yes.

THE COURT: And nobody has promised you that you'll get a shorter sentence because you are pleading guilty, than if you pleaded not guilty? Is that correct? Nobody has promised you that you'll get a shorter sentence?

THE RESPONDENT: Well, sir, I mean I have talked to so many policemen and all. They said that it would be likely that if I did cooperate that —.

THE COURT: Now, if anybody has told you, or if you are of the opinion that you may get a shorter sentence if you plead guilty than you'd get if you pleaded not guilty, that's wrong. That will have no bearing on the sentence of the court. At least it won't if I do it, and I think I'll probably be the one that does it.

Do you understand me now?

(6)

THE RESPONDENT: Yes, sir.

THE COURT: It doesn't make any difference to me whether you plead not guilty or guilty. In fact I can't accept a plea of guilty until I'm convinced that you are guilty, and you are the only one that can convince me now, because we can't try the case here today. We simply are trying to find out what you want to do, and your counsel has stated — and I'm sure he wouldn't state it if it wasn't true — that he has told you that you have a right to a trial, a jury trial, and he told you all these rights, and you understand that?

THE RESPONDENT: Yes.

THE COURT: You don't want a jury trial, and you want to plead guilty, is that correct?

THE RESPONDENT: Yes.

THE COURT: You want to plead guilty because you are guilty?

THE RESPONDENT: Yes.

THE COURT: Very well. The court feels the plea of guilty is freely, voluntarily and understandingly made, without undue influence, compulsion or duress, and without promise of leniency, and it is therefore accepted.

You are remanded to the custody of the sheriff to (7) await sentence.

The probation officer of this court will convey to the court anything that you wish the court to know, before sentence is pronounced. It will take several days, maybe weeks, to complete the case in the probation department, so that I may have the proper information before sentence is pronounced.

That's all.

APPENDIX D — SENTENCE TRANSCRIPT

(Filed March 19, 1963)

(1)

People of the State of Michigan vs. LeRoy Payne, Case No. X-751, Dated March 8, 1963. Action: Sentence.

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Philip A. Brown, Atty. for Respondent

THE COURT: Mr. Payne, you are before the court for sentence, having pleaded guilty to assault with intent to murder.

I have talked with your counsel. I have a very comprehensive report from the probation department relative to your case. I heard your testimony in the case of the People versus Lionel Bradford. I have, I think, all the facts that I need, in mind.

Do you have anything to say, or does your counsel have anything further to say? I have already talked with him, of course.

(2)

THE RESPONDENT: I'd like to say, your Honor, that I am sorry. I know that I was wrong.

THE COURT: I understood that that was your position.

MR. BROWN: I have nothing further to convey to the court, your Honor, having already talked to you.

THE COURT: Very well.

Starting with your honorable discharge from the U.S. Army in 1960 — from then on, according to your own admissions, you have been the type of citizen, or were the type of citizen, until the time you committed this crime, that would, to my mind, require elimination from society from now on.

If there is any distinction at all between superlatives, the assault of an individual with intent to murder is very bad; assault with intent to murder a policeman is worse, if, as I say, if there is any distinction between superlatives, because that's not only an attack upon the individual, it's an attack upon society; an attack upon a representative of society as a whole.

As I say, from that side of the picture it would require, in my opinion, your complete elimination from (3) society.

Now, on the other side of the question, you have voluntarily admitted — if I remember the number correctly — eighteen breakings and enterings prior to this time, or maybe including the one that you had committed just before you committed this crime.

According to your testimony, several representatives of society were guilty of unpardonable actions in connection with their treatment of you. Now, at least some of those could possibly be explained, if not excused, by the fact, that you had shot a deputy sheriff with intent to kill him. However, you have been importuned quite strongly, as I understand it, by representatives of your race, and your own mother, that they should be prosecuted for their actions in that connection, and you have stated, according to my information, that you made a mistake, and you are asking forgiveness for that, and that they made a mistake, and that you are willing to forgive them their mistake.

I am also reliably informed, and have come to the conclusion myself, that the normal reaction we get from prisoners who are awaiting sentence, that they are going to get religion. In your case I feel it's an honest one, which quite frequently it's not. At least I have (4) become convinced of that.

The sentence that I am about to impose on you will give you hope of returning to society after a — what I consider a reasonable length of time, providing that you are honestly desirous of reformation and have a change of these past actions that you have been guilty of since you got out of the army, and that you are intelligent enough to become a useful member of society after you have paid your debt to it.

I am also informed — maybe not reliably — that the two gentlemen against whom you gave testimony, namely Charles Hawkins and Lionel Bradford, have made threats upon your life, or if not that, upon causing you physical injury, so I recommend to the prison authorities that you be not incarcerated in the same place that they are, or at least not where you will come in contact with them, or they with you.

If I'm correctly informed, and I'm quite sure I am, the sentence I am about to impose on you will permit you to be subject to parole approximately ten years from this date, which will give you an opportunity, if you take advantage of the time that the statute gives you, and the extra good time that you can acquire in the penitentiary, of returning to society, assuming that you do (5) convince them, also, that you are that type of individual that should be turned loose in society.

It is the judgment of this court that you be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan, Township of Blackman, County of Jackson, under the provisions of the Michigan Code of Criminal Procedure, and the Michigan Penal Code, and the amendments thereto.

I fix the minimum term of such imprisonment at nineteen (19) years from and after this date. I fix the maximum of such term at forty years (40) from and after this date.

You are remanded to the custody of the sheriff for transmittal to Jackson.

APPENDIX E — TRANSCRIPT OF SENTENCE

(Filed September 8, 1967)

(1)

People of the State of Michigan vs. LeRoy Payne. Case No. X-751. Date 30 August 1967. Action: Sentence.

Appearances:

Hon. Chester J. Byrns, Circuit Judge
Atty. Philip Brown, Atty. for Respondent

THE COURT: This is the matter of the People of the State of Michigan versus LeRoy Payne here on a conviction of guilty to the crime of assault with intent to commit murder, which verdict was rendered in Kent County, on the request of the Defendant for a Change of Venue to get a jury that might have and did have no connection whatsoever with any local media of communications. With Mr. Payne is his attorney, Mr. Philip Brown, of St. Joseph, Michigan. Mr. Brown, is there any reason why sentence cannot be pronounced at this time?

MR. BROWN: I know of no reason, Your Honor. I previously conferred with the Court regarding sentence.

(2)

THE COURT: Mr. Payne, is there any reason why I should not pronounce sentence now?

THE RESPONDENT: No, sir.

THE COURT: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence. Is there anything further that you wish to say?

I would like to note that I have discussed this with the officer making the pre-sentence investigation as well. Is there anything further that I should consider before pronouncing sentence — any circumstances you wish me to consider?

THE RESPONDENT: I have nothing to say, Your Honor.

THE COURT: Mr. Payne, you are living proof of the tremendous rights given under our law to protect the innocent even though at times, such rights may shield the guilty. You have enjoyed rights and you will enjoy them hereafter, which the average man who would have to pay his own way could not afford.

First, you have been furnished counsel, Mr. (3) Philip Brown of St. Joseph, who has done an outstanding job on your behalf and you have good reason to know, not only from his relentless efforts in getting an appeal to win you a new trial, but, as I think the record of trial itself will show, he did an excellent job in your defense in the three days that we were in Grand Rapids.

Second: On an appeal brought by you, the Michigan Court of Appeals sent this case back to Berrien County to hear your complaint about the police handling of you following the arrest which caused your confession and plea of guilty to be non voluntary.

Third: Because there was some question as a result of the handling of you by a few officers following your arrest, which we trust will never happen again in this County, they gave you every benefit of the doubt. Your guilty plea was set aside and your confession was suppressed. You were granted a new trial at which any mention of confession of guilty plea was prohibited by this Court. Since there was within this County various news and radio media who had published facts of your (4) guilty plea and of your confession, there was a possibility that an absolutely impartial jury might not be found and a motion for a change of venue was granted for trial only, and the trial at considerable expense to the County was transferred to Kent County and there convened for three days with myself as presiding judge.

Fifth: At this three day trial, the jury was prohibited from reading or hearing any news that might possibly concern the trial. As a matter of fact, we prohibited them from reading the newspapers and we prohibited them from listening to their radios or television sets. In addition, at that trial, you got all of the benefits of law, instructions to the jury, including those instructions given on presumption of innocence on your part and the duty of the prosecution to prove your guilt beyond a reasonable doubt by all twelve of the jurors. And finally, today, after your conviction — and I will give you your sentence in a minute or two — you will still have a right to appeal at public expense if you so desire.

Mr. Payne, in presiding over your three day trial (5) I want to tell you that without any reservation, I agreed with the jury's verdict of guilty. I heard your own testimony and I heard your cross-examination, and of course I had an ample opportunity of hearing about your crime which was one of extreme violence. It was senseless; it was cruel, and frankly, I think it reflected a depravity of heart and but not for the grace of God, and the good physical condition of Victor Yost, he survived. He was shot not once, not twice, but three times. Mr. Yost has suffered and is still suffering from the near fatal wounds that you inflicted. You were there when the doctor's testimony reflected that it took some three to four hours spent in surgery trying to save this man's life. Mr. Yost is a brave and able officer and is to be complimented for the excellent and fair manner in which he testified at your trial. And a police officer, whether he may be popular with someone or not is nevertheless a symbol of authority and whoever shoots a police officer in line of duty assaults not only the officer; not only the man, but he assaults all of society because law and order cannot (6) exist unless our officers have the respect and the protection to which they are entitled to. These are precious rights of citizenship which you and I recognize and which would not exist if it were not for officers like Victor Yost who are willing not only to work, but even to die to preserve these rights.

Assault with intent to murder, especially when a gun is used, is a most serious crime when the victim is a police

officer in line of duty. I have felt since I have been judge that crime of violence are the worst, and I have felt that the use of weapons shows a willfullness and a hatred of which we have too much of in our society today.

When you appeal, and win a new trial, you wipe clean the previous conviction and sentence. You have then a presumption of innocence which I think the record will bear out and of which I maintain I protected throughout your trial and which your attorney was most zealous in insuring. This Court is no longer bound by the earlier sentence. I cite an Authority, Mr. Reporter, People versus Poole, P-O-O-L-E, 7 Michigan, Appellate 291.

(7)

THE COURT: In your trial, you might have been acquitted and set free and you also risked a larger sentence with a different judge and this is a different judge between your sentence of five and one-half years ago and today; a judge who had a more detailed account of what you did during this new trial than the judge who sentenced you on a plea of guilty and did not have the same opportunity to form impressions nor did my distinguished colleague hear all of the details as it came out in this particular trial.

I am not setting a larger sentence than what I will set in a few minutes because you appealed or because of any added work or expense of a new trial. This I assure you, and every American citizen has an absolute right to an appeal and to redress. As citizens, they are entitled to use the protection and rights that the law gives them and I would like to think that no judge will be more careful than I to insure this which we reward no man because he pleads guilty and we punish no man because he pleads innocent. The larger sentence which I impose here is based on the nature of the crime and on the impressions which I (8) formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude. Now, I had considered a mandatory life sentence because the maximum term of imprisonment here could be any term of years up

to life imprisonment. The only reason that I am not doing this is that I am looking into your past history and I have given this searching thought right up to the very last moment. You have a very poor family background for which you are not to blame, Mr. Payne. Your school reports were good and you served approximately three years in the Army and you earned an honorable discharge while in service although I believe there was a court-martial — wasn't there, Mr. Payne?

THE RESPONDENT: It was just a minor matter. It wasn't what you would call a court-martial —

THE COURT: Administrative — company punishment?

THE RESPONDENT: Yes, sir.

THE COURT: But you did receive an honorable discharge?

THE RESPONDENT: Yes, sir.

(9)

THE COURT: And by your own efforts, you completed high school and the employers you had all said that you were a good employee. I have also checked at the prison where you have been and your conduct there is reported as good during the past four years and some odd months that you have been there and that you have been using the educational and rehabilitation facilities that are available.

These are the factors which I have considered on the good side of the ledger which have frankly saved you from a sentence of life imprisonment.

The maximum term of imprisonment set by statute for the crime for which you have been found guilty is any term of years up to life imprisonment. I sentence you to be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan in the township of Blackman, County of Jackson, State of Michigan, to be confined at such penal institutions of the State as it shall direct, under the provisions of the Michigan Code of Criminal Procedure and the Michigan Penal Code, and the State Department of Corrections and amendments thereto for a minimum of twenty-five years and a maximum of (10) fifty years from and after this date. Let the record show

in connection with this offense, that between the time that Mr. Payne was arrested and today, he has been detained either in the Berrien County jail or in State Prison since November 6, 1962. That was the date that he was arrested, is that right Mr. Brown?

MR. BROWN: November 5th, Your Honor.

THE COURT: November 5th 1962, and he shall especially receive credit on this sentence both maximum and minimum for all of that period of time which our clerk here will compute on the committment papers and which of course the Corrections Commission is aware of. In addition, the good time he has earned by credit while in State Prison will also be applied to him whether or not, Mr. Payne, you go towards your maximum or not as you know depends on your contacts while in prison.

I inform you that as a matter of your constitutional rights, you are entitled to an appellate review, that is, a review by a court higher than this, of your conviction. If you are not financially able to afford counsel for such an appeal, and you desire to appeal, this court will appoint for you without charge to you, and further such (11) counsel will be furnished such portions of the proceedings had in your case as counsel requires to prepare any post-conviction motions or to perfect an appeal.

If you wish such assistance of counsel, you must complete these forms which I now give you and file a copy of each with the court within 60 days from now and you must also give a copy of each to the office of Prosecuting Attorney of this County.

Will you please acknowledge receiving in duplicate an Affidavit of Financial Condition, Form 6404 and Petition for Appellate Counsel, 6402. Have you received them?

THE RESPONDENT: Yes, I have.

THE COURT: Any bond previously authorized in this case is cancelled and the Defendant is remanded to the Sheriff of Berrien County for the execution of sentence. That's all.

APPENDIX F — AFFIDAVIT OF JUDGE BYRNS

"In accordance with the direction of the Supreme Court of Michigan in the above cause, I, Chester J. Byrns, being first duly sworn, say that:

"1. I am and have been since January, 1, 1967, one of the judges of the Second Judicial Circuit of Michigan (Berrien County).

"2. Leroy Payne, defendant-appellant in the above cause, pled guilty on December 14, 1962, before the Honorable Philip A. Hadsell, Circuit Judge, now retired, to the crime of assault with intent to murder, and was sentenced to 19-40 years.

"3. On June 15, 1967, I suppressed a confession of Mr. Payne, set aside his guilty plea and granted him a new trial based on his claim that improper means were used by the police to secure his confession which he claimed was involuntary.

"4. On August 4, 1967, I granted Mr. Payne's motion for a change of venue and transferred and heard the jury trial in Grand Rapids (Kent County), Michigan, which resulted in a verdict of guilty of assault with intent to commit murder.

"5. During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes.'

"6. Unlike Judge Hadsell who had Mr. Payne before him for only a few minutes at the time of plea and again at sentence, I had the opportunity to observe and hear Mr. Payne who took the witness stand and who was examined and cross-examined extensively. Mr. Payne's story and claim in trial of not being at all involved in the crime was in direct conflict with what

he told Judge Hadsell both at arraignment and at the plea of guilty where he not only admitted his crime but expressed sorrow and regret for it and showed thereby a remorse for his crime. At time of sentence Judge Hadsell said he believed Mr. Payne's claim of regret. At the time of sentencing by me on August 30, 1967, when given the opportunity to state anything he wished me to consider, Mr. Payne replied, 'Nothing.'

"7. At the jury trial before me Mr. Payne repeatedly denied under oath not only shooting Officer Victor Yost, but claimed under oath he was home with his wife and had while waiting earlier at church for his children at Sunday School gotten the gun used in the Yost shooting as security for a $3.00-loan to an unknown stranger and this gun and Payne's car were allegedly stolen the night of the shooting. This court believes this was a tissue of lies and so did the jury.

"8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I receive.

"9. At the trial of People v. Lionel Bradford (Berrien circuit No. X-768, Michigan Supreme Court No. 52072), a co-defendant with Payne, who was found guilty by jury of assault with intent to murder Charles Plummer (who was shot along with Officer Yost but who was out of the country at the trial of Mr. Payne) Plummer testified (Bradford trial transcript pp 49, 50, and 180) that while he (Plummer) was wounded and lying on the ground, Mr. Payne came back and stood by the left fender of the car and deliberately fired right at him.

"10. Payne testified at Bradford's trial (February 4, 1963) that Lionel Bradford and Payne were driving a 1955 blue and white 2-door Pontiac on November 5, 1962 in the early morning hours. After having broken into a restaurant in South Bend, Indiana, and a clothing store near Benton Harbor, Michigan, Payne testified that he and Bradford were stopped by a police vehicle on M-139. Bradford had told Payne he 'would not be taken.' As they stopped, Bradford and Payne jumped from their vehicle and began firing at the two officers, hitting both of them.

"Payne remembered going back to one of the officers but couldn't recall exactly what then happened. Both men subsequently jumped into their car and fled, Payne giving his gun to Bradford in a ravine and returning home where he (Bradford transcript pp 45-60) was subsequently arrested.

"On September 2, 1965, nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he gave 'false testimony' at the Bradford trial. He said that the only reason he testified at that trial was due to fear of the police, that Bradford never admitted committing crimes, and that Bradford had denied being present when the officers were shot. Further, Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Bradford on either the date of the shooting or the day before.

"11. At the Payne trial before me, in far greater detail than would have been present in a plea of guilty, it was established before me beyond a reasonable doubt that Mr. Payne had participated in the deliberate, cold-blooded attack upon and wounding three times of Officer Yost under conditions that Mr. Yost could not properly defend himself, which I felt then and do now showed a depravity of mind.

"12. I had the details of the nature of the wounds and the medical fight to save Officer Yost's life from Mr. Yost and from his surgeon, Dr. Robert Reagan,

as well as the residual and continuing damage to Mr. Yost, which Judge Hadsell on a plea of guilty would not have had.

"13. I had as a result of the trial and many facts brought out therein the conclusion that only by divine providence and not because of Mr. Payne was the life of Officer Yost saved.

"14. As stated at the time of sentencing, my increase in sentence to 25-50 years was not because the fendant asked for and got a new trial (which I granted) or a change of venue (which I granted), but because of the conditions and facts stated by me to Mr. Payne at the time of sentencing as well as the above matters which I do not believe were all known to Judge Hadsell.

"15. Further deponent says not.

[Subscribed, sworn, etc.]"

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1005

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEROY PAYNE,
Respondent.

BRIEF OF APPELLANT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

CITATION OF OPINIONS BELOW

The original Opinion of the Michigan Supreme Court dated November 9, 1971 is reported as 191 NW2d 375, and attached as Appendix A to the Petition (pp 11-41). The Opinion of the Michigan Court of Appeals affirming the judgment of the trial Court is reported at 170 NW2d 523, and attached as Appendix B to the Petition (pp 41-55).

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on November 9, 1971.

Jurisdiction is invoked under United States Supreme Court Rule 19, 28 USCA.

The United States Supreme Court granted Certiorari on October 16, 1972.

QUESTIONS PRESENTED FOR REVIEW

1. Under the facts of this case, is the second sentence of Defendant fair and in accordance with Due Process?

2. Is this sentence in accord with *North Carolina* v *Pearce*?

3. Should *North Carolina* v *Pearce* be applied retroactively?

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable United States Constitutional provision involved, in material part, is as follows:

> AMENDMENT XIV Sec 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

On the night of November 5, 1962, two police officers, Berrien County Sheriff's Deputies Vic Yost and Charles Plummer, were shot and critically wounded on a street in the City of Benton Harbor, Michigan by two assailants. The assailants were, the driver, Leroy Payne, and the passenger, Lionel Bradford, of a vehicle which the deputies had just stopped for a traffic violation. As the officers exited their vehicle and began walking toward the assailants' car, the two men jumped from that car and began shooting at the deputies. Both officers were hit and immediately downed. Leroy Payne then walked back and, while standing next to Deputy Plummer, fired again at

him at point-blank range. The assailants then left the scene.

Payne was apprehended at his home later that evening. After improper treatment by some police officers, Payne confessed to having participated in the double shooting.

On December 14, 1962, Payne was arraigned in Berrien County Circuit Court before the Honorable Philip Hadsell, Circuit Judge, and pleaded guilty to Assault on Officer Vic Yost with Intent to Commit Murder. At that arraignment, an indication of the coerced nature of Payne's confession first appeared in the record. Defendant acknowledged that he had been threatened and abused, but that he was not pleading guilty because of those threats and that abuse, but rather because he was guilty. (See Appendix C to Petition, pp 55-59).

On February 4, 1963, Leroy Payne testified in the trial of Lionel Bradford that they had together shot the two officers on the night of November 5, 1962. Judge Hadsell presided over that trial.

On March 8, 1963, Judge Hadsell sentenced Payne, noting explicitly in the record the latter's sincere compunction for having committed the offense and his forgiving the officers who abused him as the reasons for his sentence being lighter than it otherwise might have been. He then sentenced Payne to 19-40 years in the penitentiary, suggesting that, should Defendant's contrite attitude continue, he could be released in ten years. (See Appendix D to Petition, pp 59-62).

Michigan Court of Appeals on May 12, 1967, remanded the Payne case to the Berrien County Circuit Court for an Evidentiary Hearing on the voluntariness of Defendant's statement to the police and his plea of guilty.

Berrien County Circuit Judge Chester J. Byrns held that hearing and subsequently filed an Order on June 21, 1967, finding Payne's confessions and his plea to have been involuntarily given and ordered a trial to be held on the matter. Judge Byrns later ordered a change of venue for that trial to Kent County (Grand Rapids), Michigan, to avoid any possible prejudice to Defendant at trial. (See Appenix G and H, pp 40-42).

On August 24, 1967, after a three-day jury trial before Judge Byrns, in which the involuntary confessions were not admitted, and in which Defendant took the stand, denying any involvement in the shooting and establishing an alibi defense, Leroy Payne was found guilty again of Assault on Officer Vic Yost with Intent to Commit Murder.

At the sentencing hearing on August 30, 1967, Judge Byrns imposed a sentence of 25-50 years upon the Defendant, reasons for which he gave during that hearing. (See Appendix E to Petition, pp 62-67).

Two years later, on June 23, 1969, the United States Supreme Court decided the cases of *North Carolina* v *Pearce,* and *Simpson* v *Rice,* both reported at 395 US 711, 89 S Ct 2072, 23 L Ed 656, dealing with the propriety of higher sentences after retrial following reversal of the original conviction.

The Michigan Court of Appeals affirmed the *Payne* case, including the increased sentence on June 25, 1969. (See Appendix B to Petition, pp 41-55). On appeal to the Michigan Supreme Court, that Court affirmed Defendant's conviction but did, in a four to three Opinion, remand for resentencing in accordance with the majority's retroactive interpretation of *North Carolina* v *Pearce, supra.* (See Appendix A to Petition, pp 11-41).

During the course of the Michigan Supreme Court's deliberations, that Court made a formal request of Judge Byrns for an affidavit stating his reasons for imposing the second and higher sentence. Judge Byrns complied. (See Appendix F to Petition, pp 68-71).

Judge Byrns has submitted an additional affidavit in this Court (See Appendix I, pp 42-43).

ARGUMENT

I. UNDER THE FACTS OF THIS CASE, IS THE SECOND SENTENCE OF DEFENDANT FAIR AND IN ACCORDANCE WITH DUE PROCESS?

A. There are certain points about the sentence from which defendant has appealed which are uncontested.

1. The sentence of 25-50 years was well within the statutory limits.[1]

2. The sentence was properly imposed, i.e., its technical delivery was in proper form.

3. Neither the statutorily permissible, nor the actually imposed, sentence were challenged as being unusually harsh, nor excessive, except as it exceeded the sentence after the first trial. *Weems* v *United States*, 217 US 349, 54 L Ed 793, 30 S Ct 544.

4. No allegation has been made at any stage of this case, even after *North Carolina* v *Pearce*, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969) was decided, that Judge Byrns imposed the increased sentence through vindictive or retaliatory motivation, as pointed out by the Michigan Justice Black in his dissent:

> . . . let it be noted that nowhere in the Brief of Mr. Payne does there appear the slightest suggestion or hint that Judge Byrns was 'vindictive'; also that this case was received on Briefs with oral argument waived. (Appendix A to Petition, p 35).

This finding was concurred in by Michigan Justice Brennan.

> As to this case of Payne, I am satisfied that the candid statement of the circuit judge, made on the

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[1] Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the State Prison for life or any number of years. MCLA 750.83.

> record at the time of re-sentencing is free of any taint of vindictiveness, and that the sentence should be upheld. (Appendix A to Petition, p 23).

The pre-*Pearce* constitutionality of a higher sentence after retrial was discussed extensively in *Pearce*, in which case reference was made to *Ex parte Lange*, 18 Wall 163, 21 L Ed 2d 872; *US* v *Ball*, 163 US 662, 41 L Ed 300, 16 S Ct 1192; *Stroud* v *US*, 251 US 15, 64 L Ed 103, 40 S Ct 50; *US* v *Tateo*, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587, in support of the proposition that the Double Jeopardy and Equal Protection clauses of the Fifth Amendment do not prevent the imposition of such a sentence. The *Pearce* Court agreed with that proposition.

B. The sentencing process is a truth-seeking process.

Williams v *New York*, 337 US 241, 93 L Ed 1337, 69 S Ct 1079, and the case law following thereon, including *North Carolina* v *Pearce, supra*, gave the sanction of this Court to the principle that the sentence following conviction of a crime "should fit the offender and not merely the crime". *Williams* v *New York, supra*, 337 at 241, L Ed at 1341. The person standing before the Bar at sentencing is the one to whom the punishment must be fitted and the key to proper sentencing is a full and complete understanding of the offender, his crime and what his crime says of his "past life, health, habits, conduct and mental and moral propensities". *Williams* v *New York, supra*, US at 245, L Ed at 1341. Thus the law of sentencing should be so structured that as much accurate information as possible is presented to the sentencing agent, be it a judge[2] or jury[3]. See also, *Todd* v *State*, 187 SE2d 1831, (Georgia, 1972).

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[2] In most states sentence is imposed by the trial judge. In Michigan for example Justices of the Supreme Court and Court of Appeals, Circuit Judges and District Court (misdemeanor Court) Judges have the power to pronounce sentence on persons committing crimes cognizable before

(Footnotes continued on next page)

So important is it that we have exhausted all the possible sources of information about a sentence that we allow hearsay, school and work records, reputation, etc. into the pre-sentence reports. The primary test for propriety is reliability.

But, due to the human factor, sometimes the view of the offender at sentencing time either is not complete or is inaccurate. This Court, in *Williams*, recognized that the New York jury trying the merits of that case did not have all the relevant information available as to the defendant's character when it recommended a less severe penalty than the judge in fact imposed. That jury, in a sense, had a *different person* before it than was before the judge through his pre-sentence investigation. The Samuel Titto Williams before the jury was a person who committed a "wholly indefensible murder" in the course of a burglary. *Williams, supra*, US at 243 L Ed at 1340. However the Samuel Titto Williams before the sentencing judge was known to have committed, in addition to a felony-murder, some thirty other burglaries, and was possessed of a "morbid sexuality", and termed by that judge "a menace to society". *Williams, supra*, US at 244, L Ed at 1340.

The distortion or the insufficient understanding of an offender's true character can arise, as it did in *Williams*, through the inadmissibility of evidence at trial relevant to his character and background but irrelevant or unduly prejudicial as to the question of whether he had committed

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their particular court. MCLA 769.1. In Michigan it is the function of the judge and not the jury to impose sentence *People* v *Cole*, 382 Mich 695, 172 NW2d 354 (1969).

The American Bar Association Standards recommend that the sentencing should be vested in the trial judge, ABA *Standards Relating to Sentencing Alternatives & Procedures*, Approved Draft 1968, and The Function of the Trial Judge, Tentative Draft June 1972.

[3] Some states delegate the power to determine the length of prison sentences to the jury. E.G. Texas has adopted the bifurcated trial, with guilty adjudicated first and then a sentencing verdict.

a particular offense. This could occur most often in those states where juries impose sentences.

However, more often it is due to a number of practical rather than legal factors. Too often, especially in our larger urban areas, the pre-sentence officer either suffers from an overwhelming caseload or lack of sources of information concerning the person being investigated, and thus his report at time of sentencing may not accurately portray the offender's true character. Furthermore, the offender himself can distort, either intentionally or subconsciously, his own image by lies or misrepresentations to the pre-sentence investigators and/or the court or jury itself.

Most often this occurs in a plea-bargained situation where crowded dockets and relief at eliminating one more case may tend to encourage perfunctory, superficial pre-sentence investigation. While the means for the assemblage of information relative to a prospective sentencee have increased, it is far from assured that the maximum amount of relevant information existing will be available to the sentencer. And, through the means we have at our disposal for the gathering of such information have substantially increased, so, too, has the caseload with which our pre-sentence investigators must cope.

When a defendant has affirmatively chosen to keep a prosecution alive by asserting and demonstrating that the truth-seeking process leading to his conviction had in some manner been perverted to his detriment, and he asserts and wins what is for all intents and purposes his *first trial*, then, just as the defendant is given the assurance that he has by right a trial on the merits, free from error, due to him, so both the people and the defendant have a right to a sentence of a reconvicted defendant based on the best view possible of him *at the time of resentencing*, whether that view is better or worse than the view at the initial sentencing.

While we have developed an elaborate system of procedural protections for an individual accused of crime, and hedges against the arbitrary exercise of the power of society, the underlying purpose is still the determination of the truth. Ours is an adversary system of criminal pro-

cedure, but one directed towards the discovery of the truth. The "fact-finding" or "truth-seeking" nature of our system of justice has been repeatedly recognized by this Court. *Jackson* v *Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 1 ALR 3d 1205 (1964); *Linkletter* v *Walker*, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731; *Tehan* v *Shott*, 382 US 406, 15 L Ed 2d 453, 86 S Ct 459 (1966); *Johnson* v *New Jersey*, 384 US 719, 16 L Ed 2d 882, 86 S Ct 1772 (1966); *Gideon* v *Wainwright*, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR 2d 733 (1963); *Adams* v *Illinois* ..... US ....., 31 L Ed 2d 202, 92 S Ct 916 (1972).

If then the pre-trial and trial stages of a criminal proceeding are directed towards determining the truth, how much more so is the sentencing proceeding concerned with seeking the truth. The defendant prior to conviction is enveloped by the presumption of his innocence up to the moment of the finding of guilt by the trier of fact, and that presumption permeates the entire proceeding against him. However, from conviction on he stands as a person whose behavior has more or less seriously offended society, and he awaits society's disposition of him. This sentencing process is far less of an adversary contest than a trial on the merits. At sentence we are concerned with the proper way to treat the offender and essential to that determination is finding out who it is we are sentencing. See ABA Standards on *Sentencing Alternatives, supra*, (footnote 2, pp 6-7).

From this point of view it makes no difference when or where we receive information concerning a defendant, just so long as it is reliable. And, viewed strictly from the standpoint of the sentencing process, it matters not whether this is a first, second, or third sentencing; all reliable information should be considered.

C. The sentencing process affects the appellate process and *Pearce* dealt with that inter-relationship.

The problem that the court in *Pearce* took cognizance of was the inter-relationship between the sentencing process and the appellate process. As in many other areas

the respective rights and liabilities of the state and the defendant are not geometrically separate models but in some areas can seem to overlap. That overlapping requires a balancing of the respective interests to assure a fair and just result.

There are several subsidiary and interdependent questions involved:

1. Can vindictiveness directed at the defendant for having appealed play a part in the second sentencing judge's imposition of a sentence.
2. If it can, is that a *proper* motivation.
3. If it is improper,

   A. What means should be used to remedy a situation where it occurred in the past, and

   B. What means should be used to prevent its occurrence in the future.

4. Is it reasonable for a defendant to fear such vindictiveness.
5. If so, is it reasonable for such fear to play a legitimate role in deterring the defendant from appealing his conviction.
6. If it is not,

   A. How can we remedy past situations where a defendant has been improperly deterred from appealing by fear of judicial vindictiveness for doing so.

   B. How, in the future, can we allay such fear so as to remove such an improper deterrent to the exercise of the right of appeal.

7. Is the imposition of a higher sentence after reconviction after an appeal *ipso facto* evidence of vindictiveness on the part of the sentencing judge.
8. If not, what criteria are we to use in sentencing a person after reconviction in this sort of case.

Let us consider the answers to each of these questions.

1. Realistically, since the judiciary is composed of human beings, individual judges are heir to the same tend-

encies as the rest of humanity. One of those tendencies is to become irritated when someone proves us wrong, especially in a public forum. Further it is true that, since persons who share the same profession can tend to feel defensive about that profession, a certain degree of institutional irritation can arise at seeing one member of that profession being proven wrong.

On the other hand, the judge is a professional person, and as such as a class is called upon to, and, as a general rule, does, exercise a greater degree of self-control in the use of the power given him than those not of that profession.

Thus individual, as well as institutional, vindictiveness toward a successful appellant, civil or criminal, is possible, but less likely than in the population as a whole.

2. In no case that this writer has been able to discover has any court ever approved the actions of a sentencing judge acting out of a motivation of vindictiveness for the defendant's having won an appeal. It is indefensible in an individual or an institution.

3. A. Admittedly, it is a difficult fact to prove, this vindictiveness, both on the individual and institutional level. But that does not end the question. Difficulty of proof is not a reason for not requiring proof. It is no reason, just because it is difficult to prove judicial vindictiveness, to make a *presumption* that such motivation exists. To do so would be to convict our judiciary without a trial, a presumption of guilt which our whole criminal system is geared to avoid.

The proper method for demonstrating vindictiveness is the time-tested sequential steps: allegation, proof, finding and remedy. In *Payne*, there has never been an allegation, let alone proof, of vindictiveness.)

The *Pearce* rule of "identifiable conduct on the record" was not in existence until 1969. While it may be an appropriate way to insure a record for review, it lacks fairness to use it as a means to remedy a past wrong.

B. Preserving a record of the factual basis for judicial action is an appropriate tool to ensure the ability to discover and remedy vindictiveness in the future, as well as acting as a deterrent.

4. It is reasonable for any person to realize what his fellow humans are capable of, and view it with apprehension as it might affect him adversely. However, the apprehension must be reasonably proportionate to the frequency of the behavior occurring. For example, it is reasonable to be afraid of being mugged on the streets of a large city and therefore to be deterred from going out alone late a night. But it is not reasonable without more to be so afraid and so deterred within a cloistered monastery in the countryside.

5. The answer, if unclear before *Pearce,* is now clearly no.

6. A. Just as with every other question of error, there should first be an allegation of it. After allegation a defendant should be required to present or offer at least enough proof to support a legitimate inference of impropriety, at which point he could either bear the entire burden of proof to an appropriate degree, either beyond a reasonable doubt or by a preponderance, or the burden could be shifted to the state to disprove impropriety. This could be done by affidavits, at least initially, for both sides. This Court seems to have approved that procedure in *Moon* v *Maryland, cert granted* 395 US 975, 23 L Ed 2d 764, (1969), *writ dismissed,* 398 US 319, 26 L Ed 2d 262, 90 S Ct 1730 (1970); *Odom* v *US, cert granted* 399 US 904, 26 L Ed 2d 559, 90 S Ct 2203, *writ dismissed* ..... US ....., 27 L Ed 2d 122, 91 S Ct 112 (1970).

B. Establishing a rule whereby better records are made of the reasons for sentencing is a simple and just way of preserving grounds for either proving or disproving charges of impropriety.

As noted in Justice Douglas' footnote-survey of the status of the law in the states and lower federal courts prior to *Pearce* (*Pearce, supra* L Ed 674) and an annotation on the *Propriety of Increased Punishment on New Trial for the Same Offense,* 12 ALR 3rd 978 with 1972 supplement, the majority view was that in the absence of improper motivation, e.g., vindictiveness for the defendant having appealed, a higher sentence on a new trial for the same offense was proper. It is against that background we must view the sentence of Leroy Payne in 1968 by Judge Byrns.

D. Judge Byrns was not motivated by vindictiveness in imposing the second sentence.

Not only has there been to date no allegation of vindictiveness, but the facts of this case clearly demonstrate an absence of such motivation.

1. After the Michigan Court of Appeals on May 12, 1967 remanded the *Payne* case to Berrien County Circuit Court for an Evidentiary Hearing on the voluntariness of Defendant's confession and plea of guilty, Judge Byrns held that hearing and subsequently filed an Order on June 21, 1967 (See Appendix G, page 40-41) finding Payne's confessions and his plea to have been involuntarily given and ordered a trial to be held in the matter.

2. Judge Byrns later ordered a change of venue for that trial to Kent County (Grand Rapids), Michigan, to avoid any possible prejudice to Defendant at trial, (Appendix H, p 41-42).

3. On August 24, 1967, after a three day jury trial before Judge Byrns, in which no mention of the involuntary confessions or plea was allowed and in which Defendant took the stand to deny any involvement in the shooting and to establish an alibi defense, Leroy Payne was found guilty again of assault on Officer Vic Yost with intent to commit murder.

4. At the sentencing hearing before Judge Byrns on August 30, 1967, Judge Byrns spoke at length about the Defendant, his crime and the sentence to be imposed, (Appendix E to Petition, pp 62-67), in which the following statement was made by Judge Byrns:

> The larger sentence which I impose here is based on the nature of the crime and on the impressions which I formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude.

5. During the pendency of the appeal before the Michigan Supreme Court Judge Byrns at the request of that Court filed an Affidavit of Reasons for sentencing (Appen-

dix F to Petition, pp 68-71), in which Judge Byrns stated in paragraph 8:

> Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea an expression of regret from the defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I received. (Appendix F to Petition, p 69).

6. The Leroy Payne before Judge Hadsell was a contrite and penitent man, forgiving his abusers as he wished to be forgiven by Officer Yost. (Appendix C to Petition, pp 55-59). But the Leroy Payne before Judge Byrns had no such apparent remorse. Judge Byrns had found Payne to have lied on two occasions under oath. (See Judge Byrns' affidavits, Appendix F to Petition, pp 68-71; and Appendix I, pp 42-43).

Nowhere in the entire proceeding was there the slightest hint of Judge Byrns being vindictive towards the Defendant for having appealed. Quite the contrary, he materially aided the Defendant by his findings of fact as to the involuntariness of the confession and plea of guilty, as well as granting a change of venue on motion before trial for a crime which had taken place six years previous, and without employing the customary practice of first attempting to pick an impartial jury in the County of original venue. This crime, though well publicized at the time of the offense, presumably was not as fresh and well-remembered by the public as it would have been at the time the crime occurred. In fact, the picture we have is of a judge going out of his way to protect the Defendant's rights.

Based upon the law as it existed prior to *Pearce*, considering the nature of the sentencing process as fitting a punishment to the latest and best view of that defendant,

the lack of any vindictiveness in the imposition of this sentence, the sentencing here was proper and within the trial judge's discretion.

II. IS THIS SENTENCE IN ACCORD WITH *NORTH CAROLINA* v *PEARCE?*

We come now to the underlying concerns of this Court in *North Carolina* v *Pearce, supra.* In *Pearce* this Court explicitly approved the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime" *Williams* v *New York*, US at 247 L Ed at 1342. *Pearce,* US at 723 L Ed 2d at 668. But the Court in *Pearce* had two factors to balance against giving full play to the discretion of the second sentencing judge to impose a sentence which would be greater or less than the original.

A. *Pearce* sought to protect the integrity of the sentencing process.

First it sought to protect the integrity of the *sentencing* process against a potentially disastrous motivation on the part of that second judge: vindictiveness. If a judge could with impunity sentence a person not based on the man's true character, but rather with a mind to "teach him a lesson for having appealed", then the second sentence would have been a sham, a perverted use of the State's power for a clearly base reason, to punish a man for having exercised his legal right. The State would thus, as Mr. Justice Black said in his separate opinion in *Pearce*, "be making it a crime to win an appeal. . . . It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow." (*Pearce,* US 738, L Ed 2d at 677). Thus a sentence imposed out of vindictiveness would be illegal, and in fact void. The integrity of this sentencing process must be protected. Thus the Court in *Pearce* said:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. (*Pearce,* US at 725 L Ed at 669).

B. *Pearce* also sought to protect the integrity of the appellate process.

A second consideration was the protection of the integrity of the *appellate* process. Neither the courts nor any person or institution involved in the criminal process may "chill the exercise of basic constitutional rights", *US* v *Jackson,* 390 US 570, 581, 20 L Ed 2d 138, 147, 88 S Ct 1209, Appeal through a State appellate system has been held not a Federal constitutional requisite, but, when established, it must be kept free from unreasonable obstacles. *Rinaldi* v *Yeager,* 384 US 305, 310-311, 16 L Ed 2d 577, 581, 86 S Ct 1497. But a state-approved policy of higher resentences for those reconvicted after successful appeal, out of pure vindictive motivation, would be patently unconstitutional. However, the Court, while noting that "increased sentences on reconviction are far from rare" (*Pearce, supra* L Ed 669) properly did not attempt to allege that any such policy was in effect anywhere. That type of motivation had already been condemned prior to *Pearce* thus the Court said:

> And since the fear of such vindictiveness may unconstitutionally deter a defendant's right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. (*Pearce, supra* L Ed at 669).

Thus the Court found that the due process clause protects both the sentencing process and the appellate process. The problem then became how to balance the punishment-fit-the-criminal theory of sentencing with the assurance of no-judicial-vindictiveness for appealing and elimi-

nation of a reasonable apprehension of such vindictiveness by a convicted offender contemplating appeal.

C. *Pearce* promulgated a prophylactic rule to assure the integrity of these processes, but the language of that rule has been variously interpreted.

In *Pearce*, after disposing of the arguments that the higher sentence is prohibited by the Double Jeopardy clause or the Equal Protection clause of the Federal Constitution, the court said:

> A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'. [Citing *Williams* v *New York, supra*]. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams* v *New York, supra*, that a state may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.' Id at 247, 93 L Ed at 1342. (*Pearce, supra* US at 723 L Ed at 668).

Then the Court went on to formulate what it recently (*Colten* v *Kentucky*, ... US ....., 32 L Ed 2d 584, 92 S Ct ....., (June 12, 1972)), called a "prophylactic rule".

Assuming for the moment, as the Michigan Supreme Court did in the decision before this Court for review, that the *Pearce* prophylactic rule applies to Judge Byrns' sentence of the Defendant, let us note first the manner in which this question was handled by the Michigan Supreme Court.

Resolution of the federal constitutional question raised by appellant Payne requires interpretation and application of the following language from *Pearce, supra:*

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon the defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (*Pearce, supra,* US at 725-726 L Ed 2d at 669-670).

The above language raises the following question: May the judge who imposes a harsher sentence upon reconviction rely on information not possessed by the first judge regarding defendant's conduct prior to the time of his first sentencing? If not, the sentence imposed by Judge Byrns was excessive because it appears his only knowledge of Payne's conduct *after* the first sentencing was that he had earned "good time" while in prison and had been taking advantage of prison educational and rehabilitation facilities. Judge Byrns stated, *supra,* that he based his decision to im-

> pose a stiffer sentence on impressions of Payne and his crime formed during the trial.
>
> The question arises primarily because of ambiguous language in the following sentence from *Pearce*, *supra*, quoted earlier: 'Those reasons [for imposing a harsher penalty] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' (At page 726).
>
> Does 'occurring after . . . the original sentencing' refer to defendant's 'identifiable conduct' or to acquisition of 'objective information' regarding his conduct before or after original sentencing? . . . (Michigan Supreme Court, *People* v *Payne*, Appendix A to Petition, pp 18-19).

After noting that the lower courts have split after *Pearce* regarding the interpretation of the cited language from *Pearce* as well as noting that the United States Supreme Court had not clarified the question of retroactivity of *Pearce* in the case of *Moon* v *Maryland*, *supra*.

> Pending clarification of *Pearce's* requirements by the United States Supreme Court, we are persuaded that those courts are correct which have interpreted *Pearce* to require that the 'identifiable conduct' of the defendant upon which a resentencing judge relies in imposing a stiffer sentence must have occurred *after* the first sentencing. (Appendix A to Petition, pp 20-21).

Finally, the Michigan Supreme Court stated its holding:

> We conclude, and hold, that the imposition of a harsher sentence upon reconviction following appellant Payne's successful appeal was constitutionally impermissible because the record of the second sentencing does not disclose 'objective information concerning identifiable conduct on the part of the defendant occurring after

> the time of the original sentencing proceeding.' (*Pearce, supra,* at page 726.) (Appendix A to Petition, p 21).

Since the Michigan Supreme Court has decided to "apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce,* discussed infra, *pending clarification by the United States Supreme Court*" (Emphasis added) (Appendix A to Petition, p 15), that Court has promulgated a rule based upon its interpretation of *Pearce* which, though it may or may not in this case be dicta, still is binding "pending clarification" by this Court of what it meant in *Pearce.*

The question of what information concerning a defendant may be taken in consideration on a second sentencing has been discussed since *Pearce* in several cases besides *Payne.*

In *US* v *Barash,* 428 F2d 328 (2nd Cir 1970) the defendant had been convicted on twenty-six counts of bribery, was sentenced to one year and one day on each of the counts (to be served concurrently) and subsequently won a new trial on appeal. He was sentenced to higher terms than had been imposed after the first trial. Citing *US* v *Coke,* 404 F2d 836 (2nd Cir 1968) and *Pearce* as authority, the court stated:

> We, therefore, hold that the rules enunciated in *Pearce* and *Coke* prohibit (absent the justifications there enumerated) an increase in the punishment imposed after a conviction on retrial . . . (*US* v *Barash, supra*).

As noted in *Barash,* the *Coke* court cited as reasons for an increased sentence:

> . . . 'defendant's conduct since sentence was initially passed,' or . . . new information which had not come to the attention of the judge imposing the first sentence because of some action chargeable to the defendant. (*Barash, supra,* page 330).

In *Coke, supra* a pre-*Pearce* case, the court stated as follows apropos of this case:

> We pause also to note some types of reasons why a judge may conclude that a higher sentence is required after a retrial. One is that noted by the first Circuit in Marano v United States, 374 F2d 583 (1967), namely, where the defendant has engaged in anti-social activities after his first sentence — a situation frequently encountered in narcotics prosecutions but not unknown in others. Another is where the new trial reveals the crime to have been more dastardly or the defendant to have played a much larger role than was first supposed. This may occur for a variety of reasons. One is where the first conviction was on a plea of guilty, as in United States ex rel Starner v Russell, supra, 378 F2d 808, and the judge may have had only a bare outline of the offense. Another instance would be where the defendant takes the stand at the second trial and produces an impression as to guilt contrary to that intended. A third is where evidence previously unavailable to the prosecution shows that the defendant instead of being a minor cog was the master mind; a judge might well be disinclined to allow such a defendant to escape with a sentence lower than that given to others who were simply his tools. Instances such as these suffice to demonstrate that, despite contrary *ipse dixits*, the state may have an important interest in the imposition of a sentence that appears just in light of the latest and best information. (*Coke, supra,* at page 842-3)

Also, the 8th Circuit in *United States* v *Gross*, 416 F2d 1205 (8th Cir 1969), deciding a case in the light of *Pearce*, while finding that the sentences imposed did not meet the standards laid down stated with reference to *Pearce*, said:

> The court there held, in a state case, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A judge is not constitutionally precluded from imposing a heavier sentence

> in the light of events subsequent to the first trial, such as new evidence adduced at the second trial or received from presentence investigation 'or possibly from other sources.' [citation to *Pearce* at US 723] (*US* v *Gross, supra* at page 1215).

United States v *Kienlen,* 415 F2d 557 (10th Cir 1969), also post-*Pearce,* presented the case of a defendant whose plea of guilty brought him a twelve year sentence, after which he appealed and won a trial. After a jury verdict of guilty, the judge imposed a sentence of eighteen years. The judge's observations prior to sentence in *Kienlen* are strikingly similar to those of Judge Byrns in this case. The *Kienlen* judge said:

> I certainly gained the impression [at the trial] and came to believe and now believe, and largely this is from the testimony of the defendant's witnesses, his mother, his former wife, that this defendant is a brutal, assaultive type, that this information, if I had known it — I don't want to say that there wasn't any indication of that in the earlier presentence report, but to read something in a cold presentence report and to hear the witness, one by deposition and the other testifying from the stand, together with all the other information that has come to me since the original sentence was imposed, I have come to the conclusion that the sentence imposed on May 27, 1966 . . . was a lesser sentence than this defendant deserved, so the sentence to be imposed today will be a greater sentence. [*Kienlen, supra* at page 559].

Then the trial judge after a brief colloquy stated:

> I want it clearly understood that what I have said with respect to increasing the sentence or, rather, imposing a more severe sentence than I had before, is not to be taken by anyone as punishment for the exercise of constitutional rights by this defendant. (*Kienlen, supra* page 560).

Finally, the *Kienlen* court stated its assessment of the second sentence:

> In our judgment, this meets the *Pearce* standard. Naturally, the statement of the trial judge that he was not penalizing the defendant for exercising his constitutional right to appeal is not conclusive. But it is indicative of the sentencing climate. The decision was clear and rational. Finding this sentence altogether compatible with *Pearce,* we need not consider the possible retroactivity of *Pearce.* (*Kienlen, supra* page 560).

At least two state courts other than Michigan have considered the question of what type of conduct may be considered and have arrived at different conclusions. The Wisconsin Supreme Court in *Denny* v *State,* 178 NW 2d 38, (1970) considered *Pearce* and interpreted it in line with a pre-*Pearce* case of the same Wisconsin Supreme Court, *State* v *Leonard,* 159 NW 2d 577 (1968). Faced with taking either a broad or narrow interpretation of the "identifiable conduct" of *Pearce* the Wisconsin court stated:

> However, we do not read *Pearce* so narrowly because the Court said, page 723, 89 S Ct page 2079, 'a trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the Defendant's "life, health, habits, conduct, and mental and moral propensities." ' [Citing Williams v New York] This information, the court points out, may come to the attention of the judge in the second trial or from a new presentence investigation or the prison's record or from other sources. 'Subsequent events' may be the disclosure of facts unknown at the time of the first sentencing and this might well happen if no presentence report was used in the first sentencing. (*Denny, supra,* page 41)

The Wisconsin Court then adopted Justice White's concurring opinion in *Pearce,* saying "this statement is more

in accord with the language of our *Leonard case* in which we stated that the trial judge could consider events which occur or come to the attention of the sentencing court subsequent to the first sentencing." (*Denny, supra,* page 41).

The Illinois Supreme Court in *People* v *Baze,* 253 NE 2d 392 (1969) took the opposite view in what was obviously dicta to that case.

> Applying the *Pearce* rule to this case it would appear that evidence of defendant's prior convictions prompted the court, on retrial, to increase the sentence. That evidence was known at the time of the original sentencing, since the court docket recites that on defendant's original sentence evidence was heard in regard to aggravation and mitigation. However, regardless of whether such convictions were initially known, or whether they came to light on retrial when the court heard only evidence in aggravation, those convictions involved conduct of defendant occurring *prior* to the original sentencing. Such conduct could not be the basis for imposing a heavier sentence on retrial under the *Pearce* rule. In the absence of an affirmative showing of identifiable conduct on the part of defendant occurring *after* the original sentencing, on which the increased sentence was based, the imposition of the heavier sentence on retrial here violated the constitutional right to due process of law. (*Baze, supra,* page 395)

Barnes v *United States,* 419 F2d 753 (DC Cir 1969) cited by the Michigan Supreme Court in its opinion (Appendix A, to Petition, p. 19) does not really reach the question posed but is rather one in which the majority and the dissent were concerned about which type of modified sentence most achieved the result the court wanted.

Torrance v *Henry,* 304 F Supp 725 (US DC Ednc, 1969) dealt with a higher sentence after a de novo trial in a situation parallel to that found in *Colten* v *Kentucky, supra.* and thus the contrary view held by the US Supreme Court would prevail.

Pinkard v *Neil,* 311 F Supp 711 (US DC Md Tenn, 1970) is perhaps the most forthright adoption of the "narrow"

interpretation of *Pearce* and clearly interprets *Pearce* as limiting "identifiable conduct" to what the defendant actually does after his first conviction. Although it was not stated explicitly in the district judge's opinion, it appears from the *State ex rel Pinkard* v *Henderson*, 452 SW 2d 908 (Court of Criminal Appeals of Tennessee, 1969) that both the original sentence of twenty years and the subsequent sentence of ninety-nine years were imposed by a jury, in accordance with Tennessee law. The Court of Criminal Appeals noted in its opinion that there were no averments that the second jury even knew of defendant's obtaining a new trial, and on that ground found that the vindictiveness rationale underlying *Pearce* did not warrant the application of *Pearce* in any way. Thus it is apparent that the federal district judge went beyond the facts of *Pearce* and extended *Pearce* to jury-imposed resentencing, an entirely different ballgame than that where the sentencer actually is aware of the prior trial and appeal.

Though the facts in the case before this Court do not raise the question of whether or not *Pearce* applies to jury-imposed sentences, it is appropriate here, since there has been considerable litigation on this point, to note that since the underlying rationale of *Pearce* is that there should be no *vindictiveness for having appealed* or *reasonable apprehension* of vindictiveness for having appealed as the result of the constitutional permissibility of higher sentences on retrial, how can *Pearce* apply to jury-imposed sentences, where the jury is unaware of the fact that the defendant has received this trial as the result of an appeal? Vindictiveness for taking an appeal implicitly requires that the person being vindictive knows of the prior appeal. This is brought up only in passing because it illustrates how we presume, probably unconsciously, that the second sentencing agent must necessarily fight off the temptation to retaliate for the defendant's good fortune in winning an appeal. And when it is possible to obtain a second sentencer who has no knowledge of any prior proceedings in the case does it not *ab initio* remove the case from the purview of *Pearce*? (By this discussion, the writer does not intend to offer either approval or disapproval of the concept of jury sentencing.) Relative to

jury-imposed sentencing, see *Manns* v *Allman,* 324 F Supp 1149 (1971); *State* v *Miller,* 231 So 2d 260 (Fla, 1970); *Chaffin* v *Stynchcombe,* 445 F 2d 640 (5th Cir 1972); *Jerry* v *State,* 496 P2d 422 (Okla 1972); *Branch* v *State,* 445 SW2d 756 (Ct of Crim App, Texas, 1969).

Another case cited by the Michigan Supreme Court as adopting the "narrow" interpretation of *Pearce* is *Walsh* v *Commonwealth,* 260 NE2d 911 (Supreme Judicial Court of Massachusetts, Suffolk, 1970). A perfunctory reading of the case indicates that its facts are radically different from *Payne.* In *Walsh* the question under review was the sufficiency under *Pearce* of the Massachusetts procedure for appellate review of sentences in criminal cases. The holding of that Court was specifically that *Pearce* did not apply to this type of post-conviction review because the rationale supporting *Pearce* was found not to have a fertile soil in the Massachusetts sentence review system. Referring to *Pearce* the *Walsh* court said:

> It is not clear from the Court's opinion whether the same judges who had sentenced the two defendants originally resentenced them after conviction. Thus, we are not sure whether the court was concerned about the vindictiveness of particular judges or about the possibility of vindictiveness inherent in appellate procedure generally. In the Appellate Division procedure the possibility that vindictiveness of the sentencing judge could effect the ultimate sentence is totally eliminated by statute. He may not sit as a member of the Appellate Division on a case in which he did the original sentencing. Sub-section 28 A.
>
> A study of the results of Appellate Division action shows that it is highly unlikely that any person has been or will be penalized by reason of appealing the sentence imposed by the trial court. The statistical reports on appeals to the Appellate Division for the period of fourteen years ending June 30, 1969, show a total of 4,201 appeals taken. The Appellate Division increased the sentences in only 87 cases representing about 2.07 per cent of the total appeals; and it reduced the sentences in 395 cases representing about

> 9.42 per cent of the total appeals. The remainder of the appeals were either dismissed without change in the sentence, withdrawn by the appellants, declared moot, or were still pending at the end of the year entered. This record of increase in sentence in an average of six cases per year out of an average total of about 300 appeals per year does not support a claim that the ultimate sentences are influenced by vindictiveness, or that the appellants are being penalized solely because they have appealed. Moreover, in the petitioner's case there is no allegation or evidence that his sentence was increased because of this factor. This latter fact may be dispositive of the issue, although we do not decide it on that ground alone. . . .
>
> We note finally that the *Pearce* rule does not seem suited to Appellate Division proceedings. It does not permit consideration of any factors but the defendant's conduct subsequent to the first trial. Such a rule would seriously hamper the work of the Appellate Division because it would limit it to the brief period that the defendant has been serving the sentence in the state prison or a reformatory awaiting hearing on the appeal. Moreover, the rule would preclude consideration of the very factor which the Appellate Division was established to consider: Whether a particular defendant's sentence is excessively short or long compared to other defendant's sentences for the same or similar offenses. Since the Supreme Court was not considering this procedure, we do not believe that it meant the *Pearce* rule to apply to it. (*Walsh, supra,* pages 915 and 916).

Thus, one authority cited by the Michigan Supreme Court for the narrow interpretation would seem to the contrary to support a broad interpretation of *Pearce*. *Walsh* also presents rather interesting statistics on the frequency of various types of sentence changes.

Thus it appears that there is substantial authority for the broad interpretation of the term "identifiable conduct" of *Pearce*. In addition the modern theory of sentencing,

that is to fit the punishment to the criminal, would also seem to weigh heavily in favor of the broad interpretation, allowing the second sentencing judge the most accurate possible view of the person he is to sentence. New information, examples of which were given in the *Coke* case, *supra*, should be part of the second sentencing judge's reassessment of the defendant and he should not be limited to solely the defendant's conduct while in prison, a place more conducive to good behavior than the freedom on the streets (which the defendant presumably had prior to his crime and conviction). See also *People* v *Bernette*, 258 NE2d 793, (Supreme Court of Illinois, 1970).

But in this case though it was not explicitly dealt with by the Michigan Supreme Court there was additional identifiable conduct occurrring after the first conviction and that behavior was noted by Judge Byrns as a reason for his increased sentence. Commenting on Payne's testimony in 1967, attempting to explain away the physical evidence including his fingerprint on the gun used in the assault as well as the testimonial evidence against him, Judge Byrns stated:

> . . . This Court believes this was a tissue of lies and so did the jury.
>
> 8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I received. . . .
>
> On September 2, 1965 nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he

gave "false testimony" at the Bradford trial. He said that the only reason he testified at that trial was due to fear of the police, that Bradford never admitted committing crimes, and that Bradford had denied being present when the officers were shot. Further Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Payne on either the date of the shooting or the day before. (Appendix F, to Petition, pp. 69-70).

The question of whether or not a defendant's giving testimony which is either perjured or inconsistent with his prior testimony is "identifiable conduct" within the meaning of *Pearce* has been raised and discussed in several cases.

The 4th Circuit, in the *United States* v *Gambert*, 433 F2d 321 (4th Cir 1970) which will be reviewed further on the issue of retroactivity, also applying *Pearce* and *Coke*, *supra* found that:

> While we entertain no doubt that new evidence adduced at the second trial would, under some circumstances, justify increasing the length of the sentence originally imposed [Citing *Pearce*], and that such evidence could possibly be found 'where the defendant takes the stand at the second trial and produces an impression as to guilt contrary to that intended,' [*Coke, supra* at page 843], this new evidence ordinarily would serve to justify a greater sentence only where it 'reveals the crime to have been more dastardly or the defendant to have played a much larger role than was first supposed. United States v Coke, *supra*, page 842. Testimony of the defendant at his second trial which reveals 'inconsistencies and incredible explanations not before the previous sentencing court' does not constitute identifiable conduct of the type contemplated by *Pearce*. The explanation here given for the increased sentence clearly implies added punishment of the defendant without due process of law, for the commission of another crime, the crime of perjury. (*United States* v *Gambert, supra* at pages 323

and 324). See also *United States* v *Salétko,* 452 F2d 199 (7th Cir 1971).

However, the 9th Circuit in *United States* v *Sanders,* 435 F2d 165 (9th Cir 1970), found that the district court judge at the time of resentencing stated sufficient reasons for the higher sentence (20 years as opposed to an original 15):

> 1. Sanders had committed a serious crime;
> 2. Sanders had an extremely poor record as a citizen;
> 3. Sanders had obviously fabricated his defense and testified falsely at his trial, thus committing a further crime of perjury; and
> 4. It was apparent to me after studying the presentence report provided to me by the Probation Officer that Sanders had regressed rather than progressed towards rehabilitation during the time that he was in prison. I was aware of only the first two of these things at the time that I pronounced the initial sentence of 15 years. (Page 165)

The Circuit Court went on to comment on those reasons:

> The stated reasons fully comply with the requirements of *Pearce, supra.* It was appropriate for the district court judge to take Sanders' perjury into account in resentencing, *Williams* v *New York,* 337 US 241, 69 S Ct 1079, 93 L Ed 1337 (1948), and the fact that he had not been favorably considered for parole. (pages 165 and 166)

The argument that there must be a criminal conviction for the "identifiable conduct" which is to be considered in aggravation of defendant's sentence, as the court in *Gambert* seemed to say, would be to adopt an entirely new set of rules for sentencing. The vast majority of the information which sentencing judges are forced to rely upon is behavior which does not result in criminal conviction and does not occur in the judge's presence. For example he relies on what he is told of the defendant's childhood, his educational experience, his past employment, his reputa-

tion in the community and a plethora of other behavior which neither results in a conviction nor occurs in his presence. Since proper sentencing requires an accurate assessment of the sentencee, what better conduct to use than that which occurs before the judge in the course of a trial and especially when that conduct involves a defendant taking the stand and testifying to an alibi which flies in the face of reason and the other evidence presented. In such a situation conviction for perjury would seem unnecessary. In support of this see also *People* v *Brown*, 184 NW2d 226 (1970) (Michigan Court of Appeals), holding perjury at second trial "falls within the 'identifiable conduct on the part of the defendant occurring after . . .' " (at page 226)

Still another reason exists for affirming Judge Byrns' sentence, related somewhat to the last. This writer, when he first joined the Prosecutor's Office was amazed to observe the frequency that a defendant would take the stand, though under the Fifth Amendment not compelled to, and tell a story which, from the other evidence presented and from reports from police and other agencies, it was plain to see was a bold-faced lie. Upon inquiry of the older prosecutors trying the case as to how this was allowed to go on I was told, "Well, everyone's allowed a couple of lies in their own defense". This court in *Harris* v *New York*, 401 US 222, 28 L Ed 2d 1, 91 S Ct 643, stated in another context:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury [citations omitted]. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately. . . . (US at 225, L Ed 2d at 4)

This writer was unaware at the time of filing the Petition for Writ of Certiorari that Judge Hadsell had presided at the trial of Payne's co-defendant, Lionel Bradford.

III. SHOULD *NORTH CAROLINA* v *PEARCE* BE APPLIED RETROACTIVELY?

In dealing with the question of retroactivity, notice should be taken of the manner in which the Michigan Supreme Court dealt with it. In footnote 2 of the majority opinion (Appendix A to Petition, pp 14-15), that Court said:

> The United States Supreme Court has not yet decided whether *Pearce* is to be applied retroactively. Although the Court twice granted certiorari to consider the question, in each case the writ was subsequently dismissed as improvidently granted. Moon v Maryland [citation omitted]; Odom v United States [citation omitted]. We decline to predict the high Court's answer to the question of *Pearce's* retroactive or prospective application, but we will apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce,* discussed infra, pending clarification by the United States Supreme Court.

It is apparent then that the Michigan Supreme Court is in effect applying the standards of *Pearce* retroactively, i.e. *on the authority of Pearce* they are interpreting the "prophylactic rule" as a constitutional requisite applied to a pre-*Pearce* sentencing proceeding.

A. The lower courts have divided on the question of retroactivity.

Many lower courts have dealt with the question of *Pearce's* retroactivity and the results are split.

To properly understand the lower courts' rulings, we must initially divide *Pearce* into:

a) "credit" cases

b) "resentencing" cases

At least one court applied *Pearce* "retroactively" to give credit for time served but specifically refused to treat the resentencing holding of *Pearce* retroactively. *Allen* v *Henderson*, 434 F2d 26 (5th Cir 1970).

It would seem that the "credit" holding can logically be applied to all cases without requiring that *Pearce* be held retroactive as to resentencing as well. Giving "credit" to a prisoner for all time he has actually served is both logically and legally distinguishable from voiding a sentence. In the first the Court is merely ordering that the "time" that a person is counted as having spent in jail be increased. It has the correlative effect of reducing the remainder of the sentence left to serve, but does not affect in any way the validity of the sentence. On the other hand, in the second, the Court is voiding a court proceeding which was valid at the time it occurred and was so until, as here two years, later.

Dealing with the question of retroactivity of the *Pearce* resentencing rule, the lower courts, State and Federal have split. Those deciding *for* retroactivity include: *Stonom* v *Wainwright*, 235 So 2d 545 (Dt Ct of App of Fla 1st Dist (1970)); *Casias* v *Beto*, 33 F Supp 214 (1971) (US DC ND Tex); *US ex rel Williams* v *McMaum*, 436 F2d 103 (2nd Cir 1970).

Those deciding against retroactivity or withholding ruling until there is a decision from this Court on the question are: *Shedrick* v *State*, 235 So 2d 57 (1970) Dist Ct of Appeals of Fla, 4th District; *Robinson* v *Warden*, 285 A 2d 771 (1969) (Maryland Court of Special Appeals); *Pratt* v *Warden*, 259 A 2d 580 (Md Ct of Sp Apps (1969)); *Lipton* v *Baker*, 432 F2d 245, 10th Cir 1970; *Young* v *State*, 483 P2d 1020 (Sup Ct of Kansas, 1971).

Petitioner feels that a well-reasoned decision on retroactivity is that of *Commonwealth* v *Allen*, 277 A2d 803 (Supreme Ct of Penn) (1971), wherein it was decided that the "prophylactic rule" of *Pearce* should not be applied retroactively.

Perhaps the clearest exposition of the question is found in *United States* v *Gambert, supra*, in which the 4th Circuit separates *Pearce* into its constitutional and its procedural bases. A defendant has a constitutional privilege (Due

Process) from being resentenced by a vindictive judge, and whenever such a privilege is violated the Courts would act to remedy it. However the procedural rule, as to placing on the record identifiable conduct used as a basis for increased sentence should only be applied prospectively.

B. The Supreme Court's test for the propriety of retroactivity applied to this situation would mean prospective application only.

This Court's evolving 3-fold criteria for the determination as to the propriety of retroactivity in the criminal area were first clearly stated in *Stovall* v *Denno*, 388 US 293, 297, 87 S Ct 1967, 1970, 18 L Ed 2d 1199 (1967) to be:

"a) the purpose to be served by the new standards,

b) the extent of the reliance by law enforcement authorities on the old standards, and

c) the effect on the administration of justice of a retroactive application of the new standards".

See also *Linkletter* v *Walker, supra, Tehan* v *Shott, supra, Johnson* v *New Jersey, supra,* and *Adams* v *Illinois, supra.*

The purpose to be served by the new rule of *Pearce* is twofold:

1. To protect the integrity of the sentencing process by eliminating vindictive motivation from the judge's reasons for sentencing.

2. To protect the integrity of the appellate process by dissipating the reasonable apprehensions of that vindictiveness from the minds of those contemplating appeal.

But making this rule retroactive would not serve to remedy *past* refusals to appeal by those prisoners who were deterred from doing so by fear of vindictiveness in resentencing. Besides the impossibility of making such a factual determination about countless persons' states of mind, it would not remedy *their* wrong by voiding the sentences of those who *did* have a higher resentence. And those who braved the danger of "vindictiveness" but were not re-

sentenced to a higher term, are unwronged. Finally as to the few who did receive higher sentences, their exercise of their appellate rights moots *that* justification for reversal, and with no evidence of actual vindictiveness, a reversal would be on a bare legal presumption, without a single factual allegation or proof.

As to the beneficial effect for the future for defendants who presently may be deterred from appealing by vindictiveness, the fact that all prior cases of such vindictiveness have been automatically reversed would have no greater effect than the knowledge that such a danger was a thing of the past.

The extent of the retroactive effect of this rule on sentencing judges and on the accepted procedure for sentencing is obvious. Imbued with the concept that the person to be sentenced is the man before them, as best they can determine his identity and character up to the minute of sentencing, they would have had no way of knowing what type of a record *Pearce* wished them to make; and this record-making is the procedural vehicle for the enforcement of *Pearce's* rule, to assure their sentence's validity.

The final criterion, the effect on the administration of justice would also tend to support non-retroactivity. Since it is logical to assume that some judges involved in these types of cases from the past have died or are unavailable to explain their reason for the sentence under attack, a retroactive application would have the effect of a trial *in absentia*. The basis for the existence of the rule is that vindictiveness *may* be present in a resentencing (as indeed it may be in any sentence; e.g. vindictiveness towards a defendant convicted at trial *for demanding that trial instead of pleading guilty*) and it *may* be a deterrent to an appeal. However, these possibilities do not warrant the presumption of prior vindictiveness which retroactivity could well mean.

Miranda v *Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602 (1966) this Court, to protect the integrity of the fact-finding process, promulgated "procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra*, US at 444, L Ed 2d at 706). Confessions, incriminating and exculpatory statements alike were cov-

ered by the rule, in order to assure that the trial is not infected with the disease of falsehood through the use of inaccurate or untrue statements of a defendant, which, though not strictly speaking coerced, were not taken in an atmosphere that indicated a free and informed waiver of his Fifth Amendment privilege. These "procedural safeguards" have come to be known as the "*Miranda* warnings" in common parlance.

As important as these "*Miranda* warnings" are, this Court in *Johnson* v *New Jersey, supra,* applied the *Miranda* procedural safeguards prospectively only.

The parallel between the *Miranda-Johnson* model and the *Pearce-Payne* situation is striking. *Miranda* recognized an evil in the fact-finding process which, while it had been consistently condemned by the courts, this Court felt needed a method of assuring the absence of that evil, procedural safeguards: the *Miranda* Warnings. *Pearce* recognized the evil of vindictiveness for taking and winning an appeal by defendant, and provided procedural safeguards: record-making.

Miranda protected the fact-finding process; *Pearce* the sentencing and appellate processes.

Johnson applied *Miranda* prospectively only; *Payne* should apply *Pearce* in the same manner.

SUMMARY OF ARGUMENT

1. With the record of this case indicating that the sentence appealed from was regular in form, within reasonable and the statutorily prescribed limits, and containing neither allegation, nor proof, nor judicial finding of actual vindictiveness on the part of the sentencing judge, this sentence was proper and legally sufficient under the law as it existed in 1968 when it was imposed. Furthermore the theory of making the punishment for crime fit the criminal supports the sentencing of a man based on the best and most accurate view of the defendant. Thus the investiga-

tion of the defendant's character should not be truncated at the time of the first sentencing but should include all relevant and reliable data, whenever and wherever gathered.

While judicial vindictiveness for having won an appeal is improper, and the fear of it by offenders contemplating an appeal may be reasonable, the vindictiveness should not be presumed and the fear should be proportionate to the danger. Judge Byrns' sentence has never been challenged as being motivated by actual vindictiveness, and Leroy Payne has not been deterred from appealing.

2. *North Carolina* v *Pearce, supra,* sought to protect the integrity of the sentencing and appellate processes. To that end this Court promulgated a rule intended to assure the preservation of a record to allow review to eliminate vindictiveness against a Defendant for winning an appeal. That rule allows for higher resentences upon new identifiable conduct by defendant since the first sentence. Such "identifiable conduct" should include not only *actual behavior* occurring after the first sentence, but any objective information which *first comes to the attention* of the sentencing authority after the first sentence, regardless of when the behavior "occurred", contrary to the interpretation of *Pearce* by the Michigan Supreme Court. Furthermore testimony of defendant which directly contradicts earlier sworn statements, and which is found by the court and jury trying the merits to be a lie, should be considered identifiable conduct warranting an increase in sentence. *Pearce* itself would sanction the Judge Byrns' sentence.

3. In any event, where *Pearce* is interpreted to prohibit a higher sentence, it should not be applied retroactively in these types of cases. The lower Courts have split on the question of retroactivity, but the better reasoned decisions are in favor of prospective application only. This Court's own criteria for retroactivity support prospectivity since the reason for the rule does not require retroactivity and the past reliance of law enforcement officials and the effect on the administration of justice requires prospective application only.

The *Miranda-Johnson* model is analogous to the *Pearce-Payne* situation and supports prospectivity.

CONCLUSION

The sentence of Leroy Payne by Judge Byrns was reasonable and in accord with Due Process. It was technically proper and not the product of vindictiveness. Though it was prior to *North Carolina* v *Pearce,* it substantially complied with that case's requirements and, in any event, *Pearce* should not be applied retroactively. The *Pearce* rule's purpose does not require retroactivity and would seem better suited to prospectivity. Retroactivity would be unsuitable also from the standpoint of its effect on the administration of justice.

RELIEF REQUESTED

For the above reasons, Petitioner requests this Court to reverse the decision of the Michigan Supreme Court and remand this case to that Court with instructions to re-instate the sentence of Leroy Payne by Berrien Circuit Court Judge Chester J. Byrns.

Respectfully submitted,

FRANK J. KELLEY
Attorney General for the State of Michigan

ROBERT A. DERENGOSKI
Solicitor General

RONALD J. TAYLOR
Counsel for Petitioner
Prosecuting Attorney, Berrien County

Business Address:
Court House
St. Joseph, Michigan 49085

By: JOHN A. SMIETANKA
Assistant Prosecuting Attorney

RELEVANT DOCKET ENTRIES

Nov. 5, 1962	Municipal Court Arraignment
Dec. 6, 1962	Preliminary Examination
Mar. 8, 1963	Sentence (Judge Hadsell)
Oct. 12, 1966	Delayed Motion for New Trial
Nov. 9, 1966	Application for Leave to Appeal to Court of Appeals
May 16, 1967	Order to Remand for Evidentiary Hearing
June 15, 1967	Order for New Trial
Aug. 4, 1967	Order for Change of Venue Trial
Aug. 30, 1967	Sentence (Judge Byrns)
July 28, 1969	Decision of Michigan Court of Appeals
Oct. 9, 1969	Application for Leave to Appeal to Michigan Supreme Court
Jan. 26, 1970	Decision Granting Leave to Appeal to Michigan Supreme Court
Feb. 7, 1972	Petition for Certiorari to United States Supreme Court
Oct. 16, 1972	Order Granting Certiorari

APPENDIX "G"

ORDER SUPPRESSING CONFESSION
(Filed June 21, 1967)

At a session of said Court held in the Court House in the City of St. Joseph in said County on this 15th day of June 1967.

Present: Honorable Chester J. Byrns, Circuit Judge.

This matter having come on to be heard upon the Order of the Court of Appeals dated May 12, 1967, in the matter of the People of the State of Michigan, Plaintiff-Appellee vs. LeRoy Payne, Defendant-Appellant, No. 3207 which the Court of Appeals remanded this cause to the Circuit Court for the County of Berrien to assume jurisdiction and to make a determination upon a separate record of the voluntariness of the confession and of the plea of guilty by defendant on December 14, 1962 and that in the event the Court found the confession and plea of guilty to be involuntary, that the Court enter an order vacating the sentence and plea of guilty and that the defendant be re-arraigned and required to plead anew to the information.

The People having appeared by Assistant Prosecuting Attorney Harry J. Creager and the Defendant-Appellant having appeared in person and by his attorney Philip A. Brown and the Court having considered all of the testimony and evidence introduced at said hearing and being fully advised in the premises,

IT IS ORDERED that any confessions, admissions or other statements against interest, either verbal, written or stenographic during the period from the time of the Defendant-Appellant's arrest on November 5, 1962, through December 14, 1962 inclusive be and the same are hereby suppressed as being involuntary.

IT IS FURTHER ORDERED that Defendant-Appellant's sentence and plea of guilty heretofore made and entered in these proceedings be and the same are hereby vacated and are null and void.

IT IS FURTHER ORDERED that this cause be and the same hereby is remanded to the Municipal Court for the City of Benton Harbor for a preliminary examination together with such other and further proceedings which may properly come for said Court.

IT IS FURTHER ORDERED that Defendant-Appellant's bond on said charge is hereby fixed at $10,000.00.

(s) Chester J. Byrns
Circuit Judge

APPROVED:

John T. Hammond, Prosecuting Attorney
By: (s) Harry J. Creager,
Assistant Prosecuting Attorney

Business Address:
County Building
St. Joseph, Michigan

APPENDIX "H"

ORDER FOR CHANGE OF VENUE
(Filed August 9, 1967)

At a session of said Court held at the Court House in the City of St. Joseph on this fourth day of August, 1967.

Present: Hon. Chester J. Byrns, Circuit Judge.

This cause having come on to be heard upon the Motion of the Respondent, LeRoy Payne, for a change of venue, said Motion having attached thereto the affidavit of the respondent together with exhibits, the respondent having appeared in person and by his attorney Philip A. Brown and the People having appeared by Prosecuting Attorney John T. Hammond and the Court having considered the argument of counsel and the Court being fully advised in the premises:

IT IS ORDERED that Respondent's Motion for Change of Venue be and the same hereby is granted and said cause and the issues raised thereby shall be tried in the Circuit Court for Kent County, Michigan and the Clerk of the Court is directed to transmit all records in said cause to said Court for a trial by jury on the charge of assault with intent to murder.

(s) Chester J. Byrns
Circuit Judge

ATTEST:

(s) Mary Burns
Clerk, Dep.

Approved:

(s) John T. Hammond
Prosecuting Attorney

Business Address:
Court House
St. Joseph, Michigan

APPENDIX "I" — AFFIDAVIT

IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEROY PAYNE,
Respondent.

No. 71-1005

---

1. I am and have been since January 1, 1967, one of the Judges of the Second Judicial Circuit of Michigan (Berrien County).

2. I am the same person who executed at the request of the Supreme Court of Michigan on May 10, 1971, an affidavit relative to my participation in the case of the People v Leroy Payne and the same judge who sentenced Leroy Payne to 25 to 50 years.

3. In recently reexamining said affidavit, it appears that I could have noted in paragraph 6 that Judge Hadsell also had some limited opportunity to see and hear Mr. Payne when he testified as a witness for the prosecution against his accomplice or codefendant, Lionel Bradford, and admitted his personal involvement in the shooting of the two police officers, as more particularly set forth in paragraphs 9 and 10 of said affidavit.

4. Further, by way of supplement to said affidavit, this court did receive and study prior to sentencing Mr. Payne a supplemental pre-sentence report which it cannot under the present Michigan law make public, but which a higher court than this one can order produced.

Chester J. Byrns

County of Berrien
ss.
State of Michigan

On this 29th day of November, 1972, before me personally appeared Chester J. Byrns, one of the judges of the Second Judicial Circuit, who, being duly sworn, did acknowledge that he did sign the above affidavit by him made and that the same was true to the best of his knowledge and belief.

Ronald H. Smith
Notary Public, Berrien County, Michigan.
My commission expires March 5, 1976

FILE COPY

Supreme Court, U. S.
FILED
FEB 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1005

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellant,

v.

LEROY PAYNE,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF OF ~~APPELLEE~~ RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1005

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

v.

LEROY PAYNE,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF OF APPELLEE

OPINIONS BELOW

People v. Payne, 386 Mich. 84, 191 N.W.2d 375 (1971), and *People v. Payne*, 18 Mich. App. 42, 170 N.W.2d 523 (1969).

JURISDICTION

Jurisdiction was invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Appellee accepts Appellant's statement of the Constitutional provisions involved.

QUESTIONS PRESENTED

1. Should *North Carolina v. Pearce* be applied retroactively when the majority of jurisdictions considering the question have done so and when all the criteria have been met for retroactive application?

2. Assuming *Pearce* is applied retroactively should the Michigan Supreme Court's finding that there was not sufficient conduct to justify the increased sentence be affirmed?

3. Assuming *Pearce* is found not applicable to this case should this case be remanded to the Michigan Supreme Court for a determination of whether Appellee-Payne's due process rights had been violated under the Michigan Constitution when this issue was not treated by the Michigan Supreme Court and when the reasons submitted for the increased sentence were factually and legally incorrect?

STATEMENT OF THE CASE

Defendant-Appellee, Leroy Payne accepts the Plaintiff-Appellant's statement of the case, but for purposes of clarity would add the following. The Appellant strongly claims that there was conduct of Leroy Payne known to the second sentencing judge, Berrien County Circuit Judge Chester J. Byrns, not known by the first sentencing judge, Berrien County Circuit Judge Philip A. Hadsell. In the first affidavit of Judge Byrns dated May 10, 1971, justifying the increased sentence

given Payne (Appendix "F", p. 68, 70 of Petition for Certiorari, hereinafter P.C.), paragraphs 5, 6, 9, 11, 12, 13 and 14 directly stated that the reason he imposed the increased sentence was partially due to the fact that:

> "During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes'." (P.C. p. 68).

However, one month before his sentencing by Judge Hadsell, Payne testified at the trial of Lionel Bradford, his alleged partner in the shootings. At that trial, unlike Payne's trial, *both* wounded officers, Victor Yost and Charles Plummer, as well as Officer Plummer's treating surgeon, testified (2bff., 6bff., 9bff., 41bff.)* Judge Hadsell presided at this trial. At the sentencing of Payne, Judge Hadsell stated "I have a very comprehensive report from the probation department relative to your case. I heard your testimony in the case of People v. Lionel Bradford. I have, I think, all the facts that I need in mind." (P.C. 59).

Further, in paragraph "6" of his affidavit, Judge Byrns expressed the opinion that Payne no longer had remorse since he had said "nothing" at his second sentencing (P.C.

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*"2b" etc. refers to the transcript of the trial of Lionel Bradford, portions of which are Appendix B of this brief. The case is currently pending in the 6th Circuit Court of Appeals, *Bradford v. Johnson*, Case No. 72-1905.

69). However, the transcript of the second sentencing, before Judge Byrns, reveals Payne's attorney exercised the right to allocution: "The Court: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence." (P.C. 62). Further, Judge Hadsell had taken into account the possibility that Payne might lose his sense of remorse when Judge Hadsell said at the first sentencing "The sentence that I am about to impose on you will give you hope of returning to society after a—what I consider a reasonable length of time, providing that you are honestly desirous of reformation . . ." (P.C. 61).

Judge Byrns has submitted in this Court for the first time, an unsolicited second affidavit, dated November 29, 1972. This affidavit was submitted, according to its terms, once Judge Byrns became aware that Judge Hadsell had an opportunity to see Payne testify at Bradford's trial. (Appellant's Brief on Appeal, p. 43). In paragraph 4 of that affidavit, Judge Byrns states that a supplemental pre-sentence report was prepared but that he is not allowed under Michigan law to make it public. On December 18, 1972, Appellee Payne made a motion for production of that report and cited two Michigan cases which allow that report to be released at the Judge's discretion. Judge Byrns denied production of that report. In so denying the Appellee access to that report he stated:

> "This court has followed a policy generally in sentencing to tell the defendant exactly what it is in the pre-sentence report that has influenced him to give the defendant the opportunity to explain or to correct." (3a, Transcript of Hearing on Appellee's Motion for Production of Pre-Sentence Report, which appears in Appendix A of this Brief.)

In following his general policy, Circuit Judge Byrns made no mention of anything contained in the supplemental pre-sentence report upon which he relied when he increased Payne's sentence.

Further, it should be added on the procedural statement of facts that the issue of the increased sentence was pending on appeal in the Michigan Court of Appeals when *North Carolina v. Pearce* was released (P.C. 41-55) on the basis of prior Michigan law.

SUMMARY OF ARGUMENT

One of the major issues this case presents is whether *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), should be applied retroactively. When considering the criteria enunciated in inter alia, *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), to determine the degree and propriety of retroactive application, it is clear that *Pearce* should be given full retroactive effect.

First, the vast majority of state and federal courts considering the question have explicitly or implicitly applied *Pearce* retroactively. Therefore, the majority of jurisdictions have held retroactive application of *Pearce* would place a minimal burden on *their* administration of justice. Second, because there was not a set rule prior to the release of *Pearce* and because this Court has long recognized that "avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts [cite omitted]," *Pearce, supra*, 395 U.S. at 724, there is no support for a claim of detrimental reliance on the part of lower courts. Third, the purpose of *Pearce*, it should be noted, was to insure full unfettered access to the courts by defendants

and to prevent those who have appealed from being punished for the exercise of a constitutional right. Moreover, since retroactive application does not create the problems of loss of evidence and witnesses as might a re-trial, it is clear that retroactive application will serve the purpose of *Pearce* without burdening the administration of justice. Fourth and finally, the issue here under consideration was raised on appeal in Michigan on the date *Pearce* was released. *People v. Payne,* 18 Mich. App. 42, 46 (1969).

Applying *Pearce* to this case, the record below indicates there was *no* conduct of Appellee Payne before or after his first sentence which can justify his increased sentence. The second sentencing judge has claimed, as justification for the increase, that he saw Payne at a trial and heard all the brutal facts of the crime. He claims this is information that the first sentencing judge did not have because he had only taken a plea from Payne.

The second sentencing judge's claim can hardly be said to amount to finding subsequent conduct under *Pearce* standards, but more importantly, the claim is factually incorrect. The first sentencing judge not only took Payne's plea but, in addition, sat at a trial of Payne's alleged partner in the crime before he sentenced Payne. Payne testified at that trial along with witnesses who did not appear at Payne's trial 4 years later. Therefore, the first sentencing judge knew as much as, if not more than, the second sentencing judge about Payne and the crime.

The second sentencing judge also implied that he increased Payne's sentence because Payne had perjured himself and because he did not show any remorse. Again, the judge's reasons are legally insufficient and factually incorrect. The implication that Payne perjured himself is

a total rationalization. The judge who implied that Payne perjured himself was the very judge who vacated Payne's plea and suppressed his confession because it had been brutally beaten out of him. No one contests that fact. Therefore to allow a judge to allege perjury under these circumstances would create a charge easily levelled at any defendant who testifies at his own trial after vacating a prior plea of guilty.

The final allegation on which the increase was based is lack of remorse. In the instant case, the second sentencing judge acknowledged on the record that Payne's counsel had argued very eloquently for Payne in chambers. To now state that there was no showing of remorse because a defendant such as Payne fully utilized his counsel for allocution is patently absurd.

It is therefore apparent that the increased sentence in this case was based on a complete rationalization which flies in the face of the real and practical impact the sentence had. The second judge punished Payne for appealing. The judge admitted Payne's conduct in prison since the first sentence was exemplary. What the judge did not state and cannot state is even one valid reason for Payne's increased sentence. Under such circumstances, judicial vindictiveness is the only explanation.

Finally, if this Court finds that for any reason *Pearce* does not apply to this case, the case should be remanded to the State of Michigan for further proceedings because of prior Michigan case law and because of the Michigan Supreme Court's specifically avoiding a determination of whether there were independent state grounds for the *Payne* decision.

I.

NORTH CAROLINA v. PEARCE SHOULD BE APPLIED RETROACTIVELY TO DECIDE THIS CASE.

One of the main issues to be decided by this case is whether the rule enunciated in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), which limits the circumstances under which an increased sentence can be given following reconviction should be applied retroactively.

In *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), this Court cited the major factors to consider in determining whether retroactive application should be given a decision of this Court. It was there stated and subsequently followed in other cases [e.g., *Desist v. United States*, 395 U.S. 244, 22 L.Ed.2d 248, 89 S.Ct. 1030 (1969), and *Williams v. United States*, 401 U.S. 646, 28 L.Ed.2d 388, 91 S.Ct. 1148 (1971)] that retroactively must be determined by looking to the purpose of the rule, whether there was reliance placed on a prior set rule, and by examining the effect on the administration of justice of retrospective application. (381 U.S. at 336).

A further criterion mentioned in *Linkletter, supra*, and in *inter alia, Carafas v. Lavalle*, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968), is whether the issue was pending on appeal at the time the lead case was released.

When considering the above criteria, it is clear *Pearce* should be applied to decide this case. First, the vast majority of state and federal courts considering the question have explicitly or implicitly applied *Pearce* retroactively. Therefore, the majority of jurisdictions have held retroactive application of *Pearce* would place a

minimal burden on *their* administration of justice. Second, because there was not a set rule prior to the release of *Pearce* and because this Court has long recognized that "avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts [cite omitted]", *Pearce, supra,* 395 U.S. at 724, there is no support for a claim of detrimental reliance on the part of lower courts. Third, the purpose of *Pearce,* it should be noted, was to insure full unfettered access to the courts by defendants. Moreover, since retroactive application does not create the problems of loss of evidence and witnesses as might a re-trial, it is clear that retroactive application will serve the purpose of *Pearce* without burdening the administration of justice. Fourth and finally, the issue here under consideration was raised on appeal in Michigan on the date *Pearce* was released. *People v. Payne,* 18 Mich. App. 42, 46 (1969).

A. Retroactive Application of *Pearce* Would Place a Minimal Burden on the Administration of Justice.

State and federal courts which have considered the retroactivity of *Pearce* have overwhelmingly held it retroactive as to increased sentences following reconviction. Whatever burdens a resentencing might place on the administration of justice have been considered *de minimus* when compared to the purpose of the *Pearce* ruling. See, for example, *Commonwealth v. Allen,* 443 Pa. 96, 277 A.2d 803 (1971). It should be noted that not all situations involving an increased sentence following appeal and reconviction have been held controlled by the *Pearce* rationale. *Colton v. Kentucky,* ___ U.S. ___; 32

L.Ed.2d 584; 92 S.Ct. ___ (1972). Accord: *People v. Olary*, 382 Mich. 559, 170 N.W.2d 842 (1969). Those states which, contra to *Olary*, have held *Pearce* applicable to a trial *de novo* situation appear in footnote 4, *infra*.

A more detailed delineation of the state and federal decisions which have applied *Pearce* retroactively makes apparent that those jurisdictions have determined that retroactive application of *Pearce* would have a *de minimus* effect on their administration of justice.

1. *The Majority of State Jurisdictions Which Have Faced the Question Have Applied Pearce Retroactively.*

The question of the constitutional validity of harsher sentences upon reconviction has arisen in three contexts: sentences imposed by a judge, those governed largely by statutory standards, and those which are imposed by a jury.[1]

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[1] It should be noted that at least 19 states have a combination of judge or jury sentencing depending on the gravity or nature of the offense or whenever the death penalty might have been inflicted: Nine states give a general sentencing power to juries in noncapital cases: Arkansas, Ark, Stat. Ann. §43-2306, (1964); Georgia, Ga. Code Ann. §27-2502 (Supp. 1969); Indiana, Ind. Ann. Stat. §9-1819 (1956); Kentucky, Ky. R. Crim. P. 9.84; Missouri, Mo. Rev. Stat. §546.410 (1953); Oklahoma, Okla. Stat. Ann. tit. 22, §926 (1958); Tennessee, Tenn. Code Ann. §40-2707 (1955); Texas, Tex. Code Crim. Proc. art. 37.07 (Supp. 1969); Virginia, Va. Code Ann. §19.1-291 (1960). Three states give the jury sentencing power in specific cases: Alabama, Ala. Code tit. 14, §§318, 322, 336, 344, 355, 395, 409 (1958) (various offenses); Mississippi, Miss. Code Ann. §§2359, 2361 (Supp. 1968) (rape); North Dakota, N.D. Cent. Code §12-06-05 (1960). Jury used when death penalty might have been imposed: Ill. Ann. Stat. ch. 38, §1-7(c) (Smith-Hurd Supp. 1970); Md. Ann. Code art. 27, §413

a. Judge Sentencing

Thirty-seven (37) states have considered *Pearce* as it applies to judicial determination of sentencing. Of those, six (6) states have held it retroactive as it applies to sentencing credit.[2] Thirteen (13) out of fifteen (15) states applying *Pearce* to increased sentences have explicitly or implicitly held it retroactive where applicable to judicially imposed sentences after a retrial.[3] Six (6) out

(1967); Ohio Rev. Code Ann. §2901.01 (Page 1953); Pa. Stat. tit. 18, §4701 (1963). Separate Hearing used to determine penalty in capital cases; Cal. Penal Code §190.1 (West Cum. Supp. 1968); Conn. Gen. Stat. Ann. §53-10 (Supp. 1970); N.Y. Penal Law §125.35 (McKinney 1967); Pa. Stat. tit. 18, §4701 (1963).

[2] *PEARCE* HELD RETROACTIVE AS TO SENTENCE CREDIT

Arizona:	*State v. Johnson*, 105 Ariz. 21, 458 P.2d 955 (1969).
Hawaii:	*Wong v. Among*, 52 Hawaii 420, 477 P.2d 630 (1970).
Louisiana:	*State v. Williams*, 264 So.2d 638 (La, 1972)
Missouri:	*State v. Carter*, 443 S.W.2d 176 (Mo. 1969)
Nevada:	*Ibsen v. Warden*, 86 Nev. 540, 471 P.2d 229 (1970)
Texas:	*Ex Parte Ferrell*, 445 S.W.2d 729 (Tex. Cr.)

[3] *PEARCE* HELD RETROACTIVE AND APPLICABLE TO JUDGE RESENTENCING

Alabama:	*McMurtrey v. State*, 46 Ala. App. 661, 248 So.2d 157 (1971)
California:	*People v. Massengale*, 10 Cal. App.3d 689, 89 Cal. Rptr. 237 (1970)
Florida:	*Stonom v. Wainwright*, 235 So.2d 545 (Fla. 1970)
Illinois:	*People v. Baze*, 43 Ill.2d 298, 253 N.E.2d 392 (1969).

of fourteen (14) have held *Pearce* applies to trials *de novo* and have explicitly or implicitly held it retroactive.[4] Ten

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Iowa:	*State v. Pilcher*, 171 N.W.2d 251 (Iowa 1969)
Kentucky:	*Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970)
Michigan:	*People v. Payne*, 386 Mich. 84, 191 N.W.2d 375 (1971)
Missouri:	*State v. Rentschler*, 444 S.W.2d 453 (Mo. 1969)
New York:	*People v. Rodriguez*, 34 App. Div.2d 911, 311 NYS.2d 330 (1970)
Pennsylvania:	*Commonwealth v. Allen*, 443 PA 96, 277 A.2d 803 (1971)
Rhode Island:	*Cournoyer v. Sharkey*, 107 RI 373, 267 A.2d 722 (1970)
Texas:	*Miller v. State*, 471 S.W.2d 399 (Tex. Cr. 1971)
Wisconsin:	*Denny v. State*, 46 Wis.2d 541, 178 N.W.2d 625 (1970)

PEARCE EXPLICITLY HELD NOT RETROACTIVE

Maryland:	*Wayne v. State*, 8 Md. App. 5, 257 A.2d 455 (1969)
Kansas:	*Young v. State*, 207 Kan. 166, 483 P.2d 1020 (1971)

[4] *PEARCE* APPLIED RETROACTIVITY TO TRIAL DE NOVO

Arizona:	*Bronstein v. Superior Court*, 106 Ariz. 251, 475 P.2d 235 (1970)
Hawaii:	*State v. Shak*, 51 Hawaii 626, 466 P.2d 420 (1970)
Indiana:	*Eldridge v. State*, ____ Ind. ____, 267 N.E.2d 48 (1971)
Pennsylvania:	*Commonwealth v. Harper*, 219 Pa. Super. 100, 280 A.2d 637 (1971)

(10) out of the thirty-seven (37) have held it was not applicable to the fact situation before the Court.[5]

b. Statute

Both New York and California utilize a form of statutory sentencinng.[6] However, in those cases where a judge retained some discretion in resentencing, appellate

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New Jersey: *State v. DeBonis*, 58 N.J. 182, 276 A.2d 137 (1971)

Maryland: *Cherry v. State*, 9 Md. App. 416, 264 A.2d 887 (1970)

[5]*PEARCE* HELD NOT APPLICABLE TO JUDGE RESENTENCING

Alaska: *Whitton v. State*, 479 P.2d 302 (Alas. 1970)

Delaware: *Harris v. State* ____ Del. ____ 293 A.2d 562 (1972)

Georgia: *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971)

Massachusetts: *Walsh v. Commonwealth*, ____ Mass. ____, 260 N.E.2d 911 (1970).

Minnesota: *Beltowski v. State*, 289 Minn. 215, 183 N.W.2d 563 (1971)

Mississippi: *Wood v. State*, ____ Miss. ____ 257 So.2d 193 (1972)

Nebraska: *State v. Stanosheck*, 186 Nebr. 17, 180 N.W.2d 226 (1970)

New Hampshire: *State v. Flynn*, 110 N.H. 451, 272 A.2d 591 (1970)

Ohio: *State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971)

Tennessee: *Patten v. State*, 2 Tenn. Cr. App. 179, 452 S.W.2d 664 (1970)

[6]New York: Classification of Felonies, NY Penal Law § 55.05; utilization of juries in some murder convictions, NY Penal Law §125.30 §125.35; Judge sets minimum in Class A felony; NY Penal Law §70.00 (3)(a).

courts from those states have applied *Pearce* retroactively or have cited *Pearce* with approval while citing previous cases from that state as controlling.[7]

c. Jury Sentencing

In jury sentencing situations, Florida and Oklahoma have applied *Pearce* retroactively. Texas and Tennessee applied *Pearce* retroactively but would not apply it to a jury imposed sentence. Kentucky and Missouri discuss *Pearce*. It is unclear if they would hold it retroactive to judicial sentencing, however, those states held it did not apply to a jury sentencing.[8]

California: Jury sets penalty where choice is death or life imprisonment, Cal. Penal Code §190.1 (West Cum. Supp. 1968); statutory scheme of minimum and maximum; Cal. Penal Code §1168.

[7]*PEARCE* HELD RETROACTIVE AND CONTROLLING IN STATES NOW UTILIZING A FORM OF STATUTORY SENTENCING.

California: *Miller v. Hamm*, 9 Cal. App.3d 860, 88 Cal. Rptr. 538 (1970) relying upon a pre-*Pearce* California case, *People v. Henderson*, 60 Cal.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

New York: *People v. Winslow*, 34 App. Div.2d 1050, 312 NYS 495 (1970).

[8]*PEARCE* HELD IMPLICITLY RETROACTIVE AND APPLIED TO A JURY SENTENCING.

Florida: Roberson v. State, 258 So.2d 257 (Fla. 1971) Implicitly overruling *State v. Miller*, ____ Fla. ____, 231 So.2d 260 (1970).

Oklahoma: *Torbett v. State*, 487 P.2d 357 (Okla. 1971).

d. Conclusion

It should therefore be clear from a review of the states that those states considering *Pearce* have almost unanimously accepted without discussion the fact that it is retroactive. In all but two states, those which declined to apply *Pearce* did so because they found *Pearce* did not control a particular fact situation.

The conclusion is therefore inescapable that the states have considered the effect of the retroactive application of *Pearce* to have a minimal impact on the administration of justice compared to the gravity of the harm inflicted on the assertion of a constitutional or statutory right to appeal a criminal conviction.[9] As the Pennsylvania Supreme Court said in *Commonwealth v. Allen*, 443 Pa. 96, 277 A.2d 803, 806 (1971):

PEARCE HELD IMPLICITLY RETROACTIVE AND NOT APPLIED TO A JURY SENTENCING.

Tennessee:	*State* ex. rel. *Pinkard v. Henderson*, 2 Tenn. Cr. App. 240, 452 S.W.2d 908 (1969)
Texas:	*Branch v. State*, 445 S.W.2d 756 (Tex. Cr. 1969) and *Gibson v. State*, 448 S.W.2d 481 (Tex. Cr. 1969) and *Casias v. State*, 452 S.W.2d 483 (Tex. Cr. 1970).

UNCLEAR IF *PEARCE* HELD RETROACTIVE AND HELD NOT TO APPLY TO A JURY SENTENCING

Kentucky:	*Brooks v. Commonwealth*, 447 S.W.2d 614 (Ky. 1969)
Missouri:	*Spidle v. State*, 446 S.W.2d 793 (Mo. 1969)

[9]The situation in which an increased sentence may result from *re-conviction following an appeal* should be distinguished from imposition of a different sentence *upon appeal of the length of the original sentence.*

Compare: Massachusetts, *Walsh v. Commonwealth*, ___ Mass. ___, 260 N.E.2d 911 (1970). Held *Pearce* not applicable to an appellate review of sentencing where sentence can be increased on appeal. Five (5) other states by statute allow such an

"Contrasting the avowed purpose of the ruling to prevent 'penalizing those who choose to exercise' constitutional rights,' 395 U.S. at 724, 89 S.Ct. at 2080, with the negligible reliance by law enforcement officials on the old standards and the de minimus effect on the administration of justice, we hold that Pearce is to be applied retroactively. Accord, *Pinkard v. Neil*, 311 F. Supp. 711 (M.D. Tenn. 1970)."

The Petitioner-Appellant erroneously asserts that *Allen* stands for a prospective only holding for *Pearce*. *Allen* held prospective that procedural portion of *Pearce* which held that a judge must state his reasons for imposing a higher sentence at the time of sentencing. (227 A.2d at 805). *Allen* went on to hold that in *pre Pearce* cases the higher sentence would be overturned and the first sentence would "be reinstated unless the second sentencing judge files a supplemental opinion adequately and properly listing his reasons for the increased sentence . . ." 277 A.2d at 806. Thus *Allen* specifically adopted the record supplementation procedure employed in *Odom v. United States*, 400 U.S. 23, 91 S.Ct. 112; 27 L.Ed. 2d 122 (1970), in *Moon v. Maryland*, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed. 2d 262, and in *Michigan v. Payne*, 386 Mich. 84 (1970) and then specifically held that *Pearce* applied. The Court in *Allen* applied this procedure because it "recognized the difficult burden of proof of a criminal defendant encounters by attacking his increased sentence." 277 A.2d at 806.

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increase: Alaska Stat. §12.55.120 (Supp. 1969); Conn. Gen. Stat. Rev. §§51-194, 51-195, 51-196 (Supp. 1970) Me. Rev. Stat. Ann. tit. 15, §§2141-2144 (Supp. 1970); Mo. Ann. Code art. 26, §§132-138 (1966); Mass. Gen. Laws Ann. ch. 278, §§28A-D (Supp. 1969); Mont. Rev. Codes Ann. §§95-2211, 95-2501 to 95-2504 (1969).

2. *No Federal Circuit Court of Appeals Has Held* Pearce *Prospective Only.*

Ten (10) out of the eleven (11) Federal Courts and Circuit Courts of Appeal have applied *Pearce* or pre *Pearce* cases retroactively to the increase of sentence following a reconviction.[10]

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[10]FEDERAL CIRCUIT COURTS OF APPEAL DECLINING TO DECIDE RETROACTIVITY QUESTION BUT APPLYING IT TO THE CASE BECAUSE PENDING ON APPEAL WHEN *PEARCE* RELEASED.

DC Cir: *Barnes v. United States*, 419 F.2d 753 (DC Cir. 1969)

FEDERAL CIRCUIT COURTS OF APPEAL HOLDING *PEARCE* RETROACTIVE WITHOUT DISCUSSION ON SENTENCE INCREASE AFTER RECONVICTION

2nd Cir: *United States v. Barash*, 434 F.2d 358 (2nd Cir. 1970) *United States* ex. rel. *Williams v. McMann*, 436 F.2d 103 (2nd Cir. 1970).

4th Cir: *Wood v. Ross and Rice v. North Carolina*, 434 F.2d 297 (4th Cir. 1970).
Levine v. Peyton, 444 F.2d 525 (4th Cir. 1971) (*Pearce* applies to jury sentencing)
United States v. Gambert, 433 F.2d 321 (CA4 1970) (post *Pearce*, *Pearce* applied and sentence reversed)

6th Cir: *United States v. King*, 415 F.2d 737 (6th Cir. 1969)
Pendergrass v. Neil, 456 F.2d 69 (CA6, 1969) (applied *Pearce* to jury sentencing relying on *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L. Ed.2d 138 (1968)

8th Cir: *United States v. Gross*, 416 F.2d 1205 (CA 8, 1969)

9th Cir: *United States v. Sanders*, 435 F.2d 165 (CA 9, 1970)

No Circuit Court of Appeals has held that *Pearce* is not retroactive. The 10th Circuit declined to decide the retroactivity issue in *Tipton v. Baker*, 432 F.2d 245 (C.A. 10, 1970) but applied *Pearce* in any event by remanding for a determination of whether due process had been violated. The District of Columbia Circuit Court of Appeals likewise declined to decide the retroactivity question but went on to apply *Pearce* to the case before it because it, like *Payne*, was pending at the time *Pearce* was released. The Second, Sixth, Eighth and Ninth Circuit Courts of Appeal have applied *Pearce* in cases where the second sentence occurred prior to *Pearce* without a discussion of retroactivity, thus implicitly holding it retroactive. In the First and Third Circuit

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FEDERAL CIRCUIT COURTS OF APPEAL SPECIFICALLY HOLDING *PEARCE* RETROACTIVE ON INCREASES OF SENTENCE AFTER RECONVICTION.

4th Cir:	*James v. Copinger*, 441 F.2d 23 (CA4, 1971) dicta
5th Cir:	*Henderson v. United States*, 446 F.2d 557 (CA5, 1971)

CIRCUITS RELYING ON PRE *PEARCE* DECISIONS WHICH DISALLOWED HIGHER SENTENCES WHICH PUNISHED THE EXERCISE OF THE RIGHT TO APPEAL

1st Cir:	*Marano v. United States*, 374 F.2d 583 (CA1, 1967) *United States v. Daniels*, 446 F.2d 967 (CA1, 1971) through post-*Pearce* follows *Marano*
3rd Cir:	*United States* ex. rel. *Starner v. Russell*, 378 F.2d 803 (CA3, 1967) citing *Marano*, supra as to standards applicable
4th Cir:	*Patton v. North Carolina*, 381 F.2d 636 (CA4 1967)
7th Cir:	*United States v. White*, 382 F.2d 445 (CA7 1967)

Courts of Appeal, *Marano v. United States*, 374 F.2d 583 (C.A. 4, 1967), and *United States v. Russell*, 378 F.2d 808 (C.A. 3, 1967), were the precursors of *Pearce*. Cases such as *United States v. Daniels*, 446 F.2d 967 (C.A. 1, 1971), have simply cited *Marano* and not relied on *Pearce*. This is also true for two other pre-*Pearce* cases from the Seventh and Fourth Circuits *United States v. White*, 382 F.2d 445 (C.A. 7, 1967), and *Patton v. North Carolina*, 381 F.2d 636 (C.A. 4, 1967), though the Seventh Circuit subsequently adopted *Pearce* without discussion of retroactivity in *Berry v. United States*, 435 F.2d 224 (C.A. 7, 1970). Finally, the Fourth and Fifth Circuit Courts of Appeal adopted *Pearce* as retroactive after a full discussion, *James v. Copinger*, 441 F.2d 23 (C.A. 4, 1971), and *Henderson v. United States*, 446 F.2d 557 (C.A. 5, 1971). The Fifth Circuit in *Henderson* relied on a prior case from that Circuit, *United States v. Wood*, 413 F.2d 437 (C.A. 5, 1969), which had adopted *Pearce* without discussion.

It is therefore clear that the Federal Circuit Courts of Appeal have held implicitly or explicitly that *Pearce*, or the *Pearce* rationale, should be applied retroactively.

The Petitioner-Appellant misleads this Court by citing *United States v. Gambert*, 433 F.2d 321 (C.A. 4, 1970), for the proposition that *Pearce* is to be applied prospectively only. *Gambert* is a post-*Pearce* case, 433 F.2d at 322 n. 5 and text, the increased sentence having been imposed three months after *Pearce*. The Court there held that the supplemental affidavit of the second judge was not sufficient and *reversed* the higher sentence for failure to show conduct supportive of the higher sentence.

Petitioner-Appellant further cited *Allen v. Henderson*, 434 F.2d 26 (C.A. 5, 1970), implying that the Fifth Circuit has refused to treat the resentencing portion of *Pearce* retroactively. However, in a subsequent case, *Henderson v. United States*, 446 F.2d 557 (C.A. 5, 1971), the court explicitly held *Pearce* retroactive to an increased sentence and cited other Fifth Circuit cases in accord.

It is clear that the Federal Circuit Courts of Appeal feel that the retroactive application of *Pearce* would have a *de minimus* impact on the administration of justice compared to the abhorrent policy of placing a price on the exercise of a right to appeal. Being faced with the risk of a higher sentence after a successful appeal, for whatever reason it might be imposed, would have deterred many of those situated as Payne from appealing. The effect of such a policy would be to shield from appellate supervision gross abuses of a defendant's rights as occurred in Payne's case, *infra*. The implicit or explicit threat of a higher sentence should not now and never should have been the price set for access to our appellate system.

It should be emphasized as well that a reversal coupled with resentencing does not present the massive administrative burden that a re-trial might present.* All the information needed to resentence should be contained in the records of the defendant held by the courts or the relevant departments of corrections.

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*At the time this brief was in galley-proof stage, this Court released *Robinson v. Neil*, U.S. ___ , ___ L.Ed. 2d ___ , S.Ct. ___ , 12 Cr. L. 3071, (January 16, 1973). This Court there stated that retroactivity of a constitutional holding requiring resentencing was "without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus the prejudice to the State resulting from the necessity of an entire new trial . . . with the attendant difficulties of again rounding up witnesses . . . was not present." 12 Cr. L. at 3072.

3. *All of the Federal District Courts Considering the Issue Have Held Pearce Retroactive*

Of the twelve district courts considering the question, all have accepted the fact that *Pearce* ought to apply whenever the abuse of the sentencing power presents itself.[11] The District Court for the Middle and Eastern District of Tennessee have explicitly held *Pearce* retroactive. *Pinkard v. Neil*, 311 F.Supp. 711 (D.C. Md. Tenn. 1970), and *Britt v. Tollett*, 329 F. Supp. 568 (D.C. Ed. Tenn. 1971).

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[11] *PEARCE* HAS BEEN HELD RETROACTIVE BY ALL THE UNITED STATES DISTRICT COURTS WHICH HAVE CONSIDERED THE ISSUE.

ED Tenn	*Britt v. Tollett*, 329 F. Supp. 568 (DC ED Tenn. 1971)
ND Texas	*Casias v. Beto*, 333 F. Supp. 214 (DC ND Texas 1971)
WD NC	*Culp v. Bounds*, 325 F. Supp. 416 (DC WD NC 1971)
WD Va	*Griffin v. Wilkerson*, 335 F. Supp. 1272 (DC WD Va. 1971)
ED Va	*Love v. Winston*, 322 F. Supp. 567 (DC ED Va. 1971) Applicable to trial *de novo*
ED NC	*McDougald v. Ivester*, 321 F. Supp. 943 (DC ED NC 1971) Applicable to trial *de novo*
MD Tenn	*Pendergrass v. Neil*, 338 F. Supp. 1198 (DC MD Tenn. 1971) Applicable to Jury resentence
MD Tenn	*Pinkard v. Neil*, 311 F. Supp. 711 (DC MD Tenn 1970) Explicitly held retroactive.
SD Iowa	*Sefcheck v. Brewer*, 301 F. Supp. 793 (DC SD Iowa 1969)
ED NC	*Torrance v. Henry*, 304 F. Supp. 725 (DC ED NC 1969)

B. *Pearce* Should Be Given Retroactive Application To Protect Those Who Have Already Appealed From Vindictive Abuse of the Sentencing Process by Requiring That the Reasons for an Increased Sentence Be Made Available for Appellate Review.

Since the purpose of sentencing is to determine the appropriate length of sentence to be imposed on a defendant, improper use of the sentencing process to punish those who have appealed or to deter those from appealing who have not appealed affects the very integrity of the sentencing, fact-finding process. The proper use of sentencing is to consider the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 U.S. 241; 245; 93 L.Ed. 1337, 1341, 69 S.Ct. 1079 (1949). It is an abuse of the sentencing process to consider whether the defendant has appealed. *Pearce* recognized that " 'A new sentence, with enhanced punishment, based upon . . . vindictiveness would be a flagrant violation of the rights of the defendant.' (citation omitted.)" 395 U.S. at 724. Therefore, *Pearce* was dealing with more than the case where vindictiveness was the stated reason for the increased sentence. *Pearce* was concerned with whether, at any time, the "State offered any reason or justification for that sentence beyond the naked power to impose it." 395 U.S. at 726. *Commonwealth v. Allen, supra*, 277 A.2d at 806. Specifically, *Pearce* required a fact finding of "objective information concerning identifiable con-

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D Mass	*Walsh v. Picard*, 328 F. Supp. 427 (D Mass 1971)
ND Ga	*Zaffarano v. Blackwell*, 307 F. Supp. 1109 (DC ND GA 1969)

duct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." 395 U.S. at 726. Cf., *Moon v. Maryland*, and *Odom v. United States, supra.*

This Court has previously held retroactive constitutional violations affecting the integrity of the fact-finding process at sentencing. In holding *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967), retroactive this Court said in *McConnell v. Rhay*, 393 U.S. 2, 21 L.Ed. 2d 2, 89 S.Ct. 32, that the need for counsel at sentencing was apparent and should be retroactive because the right being asserted affected " 'the very integrity of the fact-finding process.' *Linkletter v. Walker*, 381 U.S. 618, 639, 14 L.Ed. 2d 601, 614, 85 S.Ct. 1731 (1965)." Likewise, in this case the use or abuse of the sentence process by a judicial officer affects the fundamental integrity of the sentencing process and the essence of fairness of the judicial system. It is clear from a reading of *Pearce* that this Court was concerned explicitly with protecting the rights of the defendant and implicitly but necessarily with the integrity of the judicial system. Cf. *United States v. United States Coin and Currency*, 401 U.S. 715; 28 L.Ed. 2d 434; 91 S.Ct. 1041 (1971).

Also to be considered in this context is the fact that at sentencing a man's liberty is directly at stake. This is what preserving the "integrity of the fact finding process" at a trial or plea is designed to protect. If retroactivity would attach where the integrity of the process of a trial or plea is at stake, *Pickelsimer v.*

Wainwright, 375 U.S. 2; 11 L.Ed. 2d 41; 84 S.Ct. 80 (1963), no less should it attach when the integrity of the process of punishment imposition is at stake.

C. As Noted in *North Carolina v. Pearce*, There Could Be No Detrimental Reliance Prior to *Pearce* on the Allowance of a Higher Sentence After a Reconviction.

To begin with, the Judge Byrns at the second sentencing gratuitously stated for the record that he was not punishing Payne for appealing: "I am not setting a larger sentence than what I will set in a few minutes because you appealed or because of any added work or expense of a new trial." He then went on the allege why he was increasing the sentence. (P.C. 65) This claim at sentencing, along with Judge Byrns' subsequent affidavits, provide ample opportunity for this Court and the lower Courts to apply the *Pearce* standards with no detrimental impact on the administration of justice in this case. This case, therefore, has proceeded much like any post-*Pearce* case might with the judge having the additional opportunity of submitting one solicited affidavit and one unsolicited affidavit. The Michigan Supreme Court found as a matter of fact and law that Judge Byrns' reasons for the increased sentence were insufficient justification and that the sentence itself was "constitutionally impermissible." *People v. Payne*, 384 Mich. 84, 97 (1971).

Further, this Court noted in *North Carolina v. Pearce*, 395 U.S. 711, 716; 23 L.Ed. 2d 656, 663-664; 89 S.Ct. 2072 (1969) in footnote 5:

> "5. The United States Courts of Appeals have reached conflicting results in dealing with the basic

problem here presented. In addition to the Fourth and Fifth Circuit decisions here under review, see *Marano v. United States*, 374 F.2d 583 (C.A. 1st Cir.); *United States v. Coke*, 404 F.2d 836 (C.A. 2d Cir.); *Starner v. Russell*, 378 F.2d 808 (C.A. 3d Cir.); *United States v. White*, 382 F.2d 445 (C.A. 7th Cir.); *Walsh v. United States*, 374 F.2d 421 (C.A. 9th Cir.); *Newman v. Rodriguez*, 375 F.2d 712 (C.A. 10th Cir.). The state courts have also been far from unanimous. Although most of the states seem either not to have considered the problem, or to have imposed only the generally applicable statutory limits upon sentences after retrial, a few States have prohibited more severe sentences upon retrial than were imposed at the original trial. See *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677; *People v. Ali*, 66 Cal. 2d 277, 424 P.2d 932; *State v. Turner*, 247 Ore. 301, 429 P.2d 565; *State v. Wolf*, 46 N.J. 301, 216 A.2d 586; *State v. Leonard*, 39 Wis. 2d 461, 159 N.W.2d 577."

To this list could also be added *People v. Mulier*, 12 Mich. App. 28 (1968), upon which Payne's appeal to the Michigan Court of Appeals was based.

As this Court said in *People v. Donnelly*, 397 U.S. 286, 294, 25 L.Ed. 2d 312, 319, 90 S.Ct. 1033 (1970): "Deviant rulings by circuit Court of Appeals, particularly in apparent dictum, cannot generally provide the 'justified reliance' necessary to warrant withholding retroactive application of a decision . . ." See also *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 L.Ed. 2d 1231, 88 S.Ct. 2224 (1968).

D. Because Appellee Payne Had Preserved the *Pearce* Issue on Appeal Before *North Carolina v. Pearce* Was Decided, He Should Be Afforded the Protection of Retroactive Application.

At the time *North Carolina v. Pearce* was released, *People v. Payne*, 18 Mich. App. 42 (1969), was pending in the Michigan Court of Appeals. Payne's appeal was based upon *People v. Mulier, infra*, a 1968 decision of Michigan Court of Appeals. In the majority *Payne* opinion from the Michigan Court of Appeals, application of *Mulier* was denied on the basis that the second sentencing judge had obseeved Payne at a trial and not at a plea as had the first judge. At that time the Michigan appellate court was unaware that the first judge had seen Payne and heard as many, if not more facts about the shootings than had the second judge since the first judge presided over the trial of Payne's alleged accomplice, Lionel Bradford. (See *infra.*) It is now unclear how the Court of Appeals would have ruled had they known this crucial fact. Further, while the Michigan Court of Appeals' dissent discussed *Pearce*, the majority did not. In any event with the limited knowledge that they had, the Michigan Supreme Court held as a matter of fact and law that the *Pearce* standards had not been met. *People v. Payne*, 384 Mich. 84 (1971).

To now deny Payne the protection of *Pearce* or *Mulier* would be contrary to any concept of due process. *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965); *Carafas v. Lavallee*, 391 U.S. 234, 20 L.Ed. 2d 554, 88 S.Ct. 1556 (1968); *Tehan v. Shott*, 382 U.S. 406, 15 L.Ed. 2d 453, 86 S.Ct. 459 (1966); *Angelet v. Fay*, 381 U.S. 654, 14 L.Ed. 2d 623, 85 S.Ct. 1750 (1965).

While we in no way retreat from the position that *Pearce* should be applied with full retroactivity, it would be a travesty of justice to deny relief to those defendants who had raised the complaint raised here prior to *Pearce*. This is particularly true where the impact on the administration of justice would be slight, where the right asserted goes to the essence of the use or abuse of the sentencing process, and where the judge has had adequate opportunity to express his reasons to the courts for the increased sentence.

II.

ASSUMING *PEARCE* APPLIES RETROACTIVELY, PAYNE'S INCREASED SENTENCE CANNOT LEGALLY OR FACTUALLY BE SUSTAINED.

A. There Is No Conduct After Payne's First Sentencing Which Can Justify the Higher Sentence.

This Court in *Pearce* described the situation in which an increased sentence may occur and the procedure to be used in the following brief passage:

> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (395 U.S. at 726).

From this it can be seen that *Pearce* is concerned with more than explicit judicial vindictiveness. Any increase in sentence would violate due process if its sole purpose was to punish a defendant for exercising a constitutional or statutory right to appeal. Therefore, *Pearce* extends beyond the bounds of announced judicial vindictiveness. This is so because knowledge of the possibility of an increased sentence would naturally have a direct effect on a defendant's decision as to whether he should appeal.

> "A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." (395 U.S. at 726).

Pearce does, of course, permit a sentence increase when it is based on a defendant's conduct subsequent to the original sentencing. Such objective conduct would be a factor in determining whether a defendant's sentence increase was a product of judicial vindictiveness. More important, however, is that if the defendant must be personally responsible for acts before his sentence can be increased, then he has it within his own power to prevent an increase. Any dilemma–if the dilemma is warranted even under this circumstance–would be of his own choosing.

The rationale behind such a ruling is apparent. A defendant considering whether to appeal a conviction has no idea what might motivate a judge or jury at resentencing, should he be reconvicted. If increases are permitted without denoting what reasons can support the second sentence, any appeal would be at the risk that his sentence might be increased for reasons over which he has no control–thus perpetuating the very dilemma *Pearce* sought to correct.

An excellent case dealing with the decisional dilemma the exercise of a constitutional right can create is *United States v. Jackson*, 390 U.S. 570, 20 L.Ed.2d 138, 88 S.Ct. 1209 (1968). *Jackson* involved the death penalty and the effect of its threat on the defendant's assertion of his right to a jury trial. The language of that opinion indicates that this Court was not as concerned with the certainty that the prospects of a more severe punishment would deter the exercise of a defendant's right to a jury as with the *tendency* that such a threat would have that effect. This is equally true in the *Payne* situation. It is the possibility of an increased sentence without the power to prevent it that necessarily has deterred and will deter appeals if the conduct to be considered in aggravation of the original sentence can have occurred at any time and is not subject to limiting guidelines.

The judge at Payne's re-sentencing listed three primary factors he considered in increasing Payne's sentence. First, he considered the fact that he sat through an entire trial and heard far more about Payne and about the crime than did the first sentencing judge, Judge Hadsell. Second, he felt that Payne had perjured himself at the second trial. And third, he felt that Payne failed to show any remorse. We will show that Judge Byrns was factually incorrect in his assertions and, further, that they are not the kind of conduct contemplated as permissible by *Pearce* in order to sustain a higher sentence.

1. *It Is Legally Insufficient and Factually Incorrect To Claim That Seeing Appellee at a Retrial Was Conduct Sufficient upon which To Base His Higher Sentence.*

This Court recognized implicitly in its disposition of *Simpson v. Rice,* companion case to *Pearce, supra,* that the mere fact that a judge has had a greater opportunity to observe a defendant at trial is an insufficient basis, without more, upon which to justify an increased sentence. This was noted by the majority opinion in the Michigan Supreme Court below, 386 Mich. at 91-92 n. 5:

> "Nor is the present case distinguishable from *Pearce, supra,* because Mr. Payne's original conviction was by guilty plea, that is, because only the second sentencing judge had the opportunity to gain impressions of Mr. Payne and his crime throughout a trial. In *Pearce's* companion case, *Simpson v. Rice,* Mr. Simpson's original convictions were by guilty plea; he was subsequently reconvicted by a jury, whereupon he received a stiffer sentence. Whatever our own views are, we cannot ignore the fact that the United States Supreme Court did not find this difference between *Simpson* (one trial) and *Pearce* (two trials) worthy of distinguishing note. The holding of the Court as regards harsher sentence upon reconviction applied fully to both cases."

It is questionable, moreover, under the factual situation presented in this case, whether the second sentencing judge can be said to have had any advantage over the first sentencing judge with respect to observation of Payne at trial. As mentioned in Appellee's Statement of the Case, Payne testified at the trial of Lionel Bradford, an alleged accomplice in the shootings of Officers Yost and Plummer, between the time he pleaded guilty to and was sentenced for his assault upon Yost. (Appellee's Appendix B). The testimony at that trial concerning the gravity

of Payne's conduct was equivalent in scope and content to the similar testimony elicited at Payne's trial over four years later. This can be seen by comparing the testimony of Officer Yost at both trials (2b *et seq.*] and Appendix of Appellant in Michigan Supreme Court, 1a-38a); by comparing the testimony of Dr. Luther Zick, who treated Plummer and testified at the first trial 6b *et seq.*) with the testimony of Dr. Robert Reagan, who treated Yost and testified at the second trial (Appendix of Appellant in Michigan Supreme Court, 78a-88a) and by noting that Officer Plummer, whom Payne was alleged to have shot in addition to Officer Yost, testified only at the first trial before Judge Hadsell (41b *et seq.*). At the Bradford trial Payne admitted participation in the shootings (10b *et seq.*) while he denied being involved four years later at his own trial. (Appendix of Appellant in Michigan Supreme Court, 159a). Thus while Payne had not himself been brought to trial and subjected to scrutiny as a defendant in jeopardy by the first sentencing judge, it would be foolish to content that the second sentencing judge had any significantly different data on which to judge the gravity of Payne's offense. Judge Byrns apparently has recognized this point through submission of his unsolicited second affidavit (Appellant's Brief on Appeal, p. 43) though, in paragraph 3 thereof, his characterization off Judge Hadsell's opportunity to see and hear Payne at the Bradford trial as "limited" hardly squares with either the comparative testimony in the two trials outlined above, or with Judge Hadsell's understanding upon sentencing Payne that he had "all the facts . . . in mind." (P.C. 59).

2. *It Is Legally Insufficient and Factually Incorrect To Base an Increased Sentence Upon a Claim that Payne Perjured Himself at His Second Trial.*

Though Judge Byrns implicitly indicated at the second sentencing that he disbelieved Payne's 1967 trial testimony by stating that he "agreed with the jury's verdict of guilty," (263a), it was not until May 10, 1971, when Judge Byrns submitted an affidavit upon request of the Michigan Supreme Court, that he explicitly charged Payne with perjury at the 1967 trial and adopted that claim as relevant to Payne's increased sentence. (P.C. 68-69).

It cannot be denied that Payne testified differently at his 1967 trial than he did at the March, 1963, trial of Lionel Bradford and at his December, 1962, guilty plea hearing. There is overwhelming justification for Payne's change of testimony, however, in view of the facts behind his arrest, guilty plea, and subsequent testimony at the Bradford trial prior to his own sentencing.

Leroy Payne was arrested at his home in the early morning hours of November 5, 1962, and later charged with assault with intent to murder[12] Officer Yost. Approximately 24 hours later Payne confessed to his involvement in the shooting of Yost and Plummer, and implicated Lionel Bradford. During the day and night that elapsed between his arrest and confession, Payne was beaten, derided with racial epithets by police officers, and repeatedly subjected to torture by sheriff's officers including the squeezing of his genitals and twisting of his

[12]MCLA 750.83; MSA 28.278. This offense carries with it a maximum sentence of life or any number of years.

fingers. His family was threatened and he was deprived of food, water and sleep until he confessed. (27b-31b). Though he was taken in a beaten condition before a judge during that 24 hours for purposes of arraignment, the judge did nothing about his condition and returned Payne to his captors (30b).[13] The following 3 days were marked by additional torture of Payne at the hands of Michigan State police personnel as well as Benton Harbor, Michigan, police officers (31b-35b). Payne's arm was twisted and his genitals squeezed until his previously extracted confession was reaffirmed for purposes of a tape recording. Payne remained in the custody of the Berrien County Sheriff's Department until December 14, 1962, when he pleaded guilty, and remained in that custody up to his sentencing following the Bradford trial.

Both Payne's plea of guilty and his testimony at the Bradford trial have been ruled coerced and hence, unreliable. Following remand from the Michigan Court of Appeals (Appendix of Appellant in Michigan Supreme Court, 251a.), Judge Byrns himself in June, 1967, found Payne's confession and plea involuntary and ordered the plea vacated and a trial held (Ibid., 253a-254a). As to Payne's testimony at Bradford's 1962 trial; the Honorable Cornelia Kennedy of the United States District Court for the Eastern District of Michigan, in *Bradford v. Johnson*, Civil Action No. 37176, granted Lionel Bradford's petition for a writ of habeas corpus in an opinion and order dated July 14, 1972, and gave therein her reasons:

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[13]Ironically, Payne's beaten condition was such that a photograph of him taken around the time he was arraigned on the arrest warrant and sought to be introduced to impeach his testimony at Bradford's trial was not admitted on grounds that it was too inflammatory. (45b-48b).

"No court would knowingly allow the police or prosecutor to call a person to testify who had no knowledge of the case and encourage him to conjure testimony simply because the State needed a witness. In effect, that is what happened here. Through the use of medieval torture techniques Payne was asked to be the star witness with a reward of cessation of pain and fear upon giving the proper testimony. The real threat of further abuse was not removed. Under these circumstances, the use of knowingly coerced incrimination of another is so patently untrustworthy that it rivals the knowing use of perjured testimony. The petitioner ought, at least, under a system of rebuttable presumption of innocence, be given the safeguard of uncoerced, untortured incrimination by another.

"For the reasons stated herein the motion to dismiss the petition for writ of habeas corpus is DENIED and the petition for writ of habeas corpus is GRANTED.

"IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence imposed upon petitioner LIONEL BRADFORD by the Circuit Court for Berrien County, Michigan, on February 6, 1963, be vacated."

Bradford v. Johnson, supra, is currently pending in the United States Court of Appeals for the Sixth Circuit, Docket #72-1905.[14]

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[14] Judge Kennedy's opinion of Bradford's trial was shared by three justices of this Court. See dissenting opinion of Mr. Chief Justice Warren, joined by Justices Douglas and Marshall, to denial of petition for certiorari in *Bradford v. Michigan*, 394 U.S. 1022, 23 L Ed.2d 48, 89 S.Ct. 1638 (1969).

While Judge Byrns may *subjectively feel* that Payne did not tell the truth at his 1967 trial, the record is clear, both legally and factually, that any deviation between Payne's 1967 testimony and his earlier testimony is explainable in terms of violations of Payne's constitutional rights. Hence an increased sentence based upon that deviation would create a situation in which Payne "suffers anew from the deprivation" of his constitutional rights. *Burgett v. Texas*, 389 U.S. 109, 115, 19 L.Ed.2d 319, 325, 88 S.Ct. 258 (1967).

While Judge Byrns claims Payne to be a perjurer, no formal charges of perjury have been filed against Payne. Indeed, Judge Byrns' charge against Payne could be made against any defendant whose conviction by guilty plea is vacated and who claims innocence at a new trial. Such is hardly "*objective* information concerning identifiable conduct," *Pearce, supra*, 395 U.S. at 726, unless the second sentencing judge is allowed to occupy the positions of prosecutor, judge, and sentencer—a concept prohibited as a flagrant denial of due process in *In re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955). C.f. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

3. *It Is Legally Insufficient and Factually Incorrect To Base an Increased Sentence on the Fact That Payne's Remorseful Attitude Had Changed.*

In his affidavit to the Michigan Supreme Court, Judge Byrns claimed as a reason for Payne's increased sentence that he showed no remorse for his part in the shootings (P.C. 68, 69). The transcript of the second sentencing shows, however, that Payne's attorney did speak on his behalf prior to imposition of the second sentence: "The

Court: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence." (P.C. 62). Payne's failu_ to add to what his attorney had told the judge can hardly qualify as "identifiable conduct" warranting an increased sentence.

Even had there been no exercise of allocution by Payne or his attorney, under Michigan law the judge would have had no right to increase Payne's sentence because he continued to maintain his innocence following conviction. In the recent case of *People v. Arthur Lee Bottany*, ___ Mich. App. ___ (Docket #12201, released to parties October 55, 1972), Judge, now Michigan Supreme Court Justice Charles L. Levin made it clear that convicted defendants must not be made to trade their right to trial or appeal in exchange for a reduced sentence. Arthur Lee Bottany, the defendant, and his brother, John Bottany, were charged with breaking into and robbing a tavern. John chose to plead guilty while Arthur Bottany chose to exercise his right to trial and was convicted.

> "At the time the judge accepted John Bottany's plea of guilty, he told Arthur Bottany, the Defendant:
>
> 'The Court: * * * Now, I understand you want a jury trial on ten year maximum and a four year maximum?
>
> A. Yes, sir.'
>
> 'The Court: The philosophy of this Court that I follow–'
>
> 'Let me get that decision.'
>
> 'The Supreme Court has just handed down a decision in *Brady* versus *United States* [397 U.S. 753; 90 S.Ct. 1463; 25 L.Ed.2d 747 (1970)] in regard to guilty pleas.'

'The United States Supreme Court indicated—and I will quote exactly from that opinion, and I follow the philosophy of the United States Supreme Court—"Of course, the prevalence of guilty pleas explainable does not necessarily validate these pleas for the system which produces them; but we cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success and rehabilitation over a short period of time than might otherwise be necessary."

'In order words, the man who pleads guilty indicates a frame of mind that he owes a debt to society, and it's going to take a very little time to rehabilitate him.'

'A man who comes in and demands all his constitutional rights and says he is innocent and denies the crime, if he is found guilty, the United States Supreme Court indicates it may take a longer period of time to rehabilitate him.'

'And the Court follows that philosophy, too.'

"That is not an accurate statement of the law of Michigan. In *People v. Earegood,* 383 Mich. 82, 83, 85 (1970), the 'defendant appeared before the trial judge at which time a call of the criminal calendar took place. On that occasion, the judge made the following statement:

'I think it is about time to make my usual announcement, gentlemen. The purpose of this call is to get pleas. If you are going to plead or waive a trial by jury now is the time to do it, so we can schedule. The Court has a long memory, and all this goes on record, and when it comes time for sentence, if you plead or waive a jury at

> the last minute, *it is a factor I take into consideration in sentencing.* I am sure you all know the risk.' (emphasis supplied)"

Defendant later plead guilty and appealed. The Supreme Court remanded for resentencing, saying:

> '[I]t is impermissible for a judge in imposing sentence to take into consideration as a factor in determining the term of the sentence the fact that the defendant pled or waived a jury at the last minute.'

"In *People v. Snow,* 386 Mich. 586, 592 (1972), which followed *Earegood,* the 'essential issue,' as stated by the Michigan Supreme Court, was:

> 'Is the sentence of a trial court illegal if it was made harsher as a result of appellant's exercising his constitutional right to trial by jury and right not to plead guilty?'

The Court replied affirmatively and once again remanded for resentencing.

"The law in other jurisdictions is in accord. In *Scott v. United States,* 419 F.2d 264, 267 (C.A. D.C. 1969), the sentencing judge stated that he did not believe the defendant, Scott, that he believed that Scott had deliberately lied and if Scott had pled guilty he might have been more lenient. Later the judge said, 'I hope sometime I hear some defendant say, "Judge, I am sorry, I am sorry for what I did". That is what I have in mind.' The Court of Appeals for the District of Columbia Circuit reversed, saying that Scott's refusal to admit his guilt and to show remorse was not a factor which the judge could properly take into consideration in imposing sentence.

"The *Scott* Court referred to an earlier opinion of the United States Court of Appeals for the Fifth Circuit, *Thomas v. United States,* 368 F.2d 941, 946

(C.A. 5, 1966), where the sentencing judge stated that if the defendant would 'come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of sentence to be imposed.' The defendant persisted in protesting his innocence and was sentenced to serve a term of 25 years. In reversing, the Fifth Circuit declared:

> 'When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed right.'

"Judge Leventhal, in a perspicuous concurring opinion in *Scott,* took an intermediate view (p. 282):

> 'It is not easy for me to define why I concur in a judgment of remand. There is a natural, and I believe sound, disposition to adjust sanctions when an offender admits his responsibility. This blends in with a readiness to accept the conclusion that such a person has the stuff that portends future improvement. I dare say that many judges, possibly the overwhelming majority, respond in this way, and I am not ready, at least as of this writing, to say that their approach is inadmissible. The wellsprings of human experience are known to every parent concerned with bringing up children, and who has invoked, consciously or not, Parson Weems' account of George Washington and the cherry tree.
>
> 'What we have before us is the difference of degree that amounts to a difference in kind. There is a line between responding favorably to an individual's sincere expression of remorse, and reacting in a hostile way because of a personal belief in the guilt of one who maintains his innocence and seeks review of the judgment.'

"Should the defendant be convicted once again on retrial, the sentencing judge may not take into consideration the fact that the defendant chose to exercise his right to a jury trial." (*People v. Bottany, supra*).

It is significant that Judge Levin observed the following in *People v. Bottany, supra,* at fn. 6:

"The District of Columbia Circuit, in adopting the reasoning of the Fifth Circuit, said that *Scott* (p. 268) 'could reasonably have believed that he could show penitence—real or affected—only at the price of prejudicing his appeal, if not worse. Whether the trial judge intended or not "to bargain thus with the defendant" we conclude that "the court was without right * * * to put a price on an appeal".' "

"Similarly, see *O'Hara v. People,* 41 Mich. 623, 624 (1870), where the Michigan Supreme Court said:

'When a convicted person is brought up for sentence he has rights still, and it is specially incumbent on the judge to take care that they are fully observed and protected. No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him, and any attempt cannot fail to be reprobated. Standing at the bar to receive judgment the law surrounds him with its protecting principles and intends that his sentence shall be the reflection of its justice and as far as possible free from all taint of human frailty.'

"The *Scott* Court also rejected the argument that the judge could impose additional punishment because the defendant had committed perjury, saying that if the government wished to prosecute Scott for the independent substantive offense of

perjury it could do so and that in such a proceeding he would be entitled to all the protections of a criminal trial. Similarly, see *People v. White*, 267 N.E.2d 127 (Ill. App. 1971), where the sentencing judge stated that the matter was 'more aggravated by the circumstances of perjury and so forth.' In remanding for resentencing the Illinois appellate court declared that a sentencing judge may not take into consideration his belief that the defendant perjured himself when he testified at his trial because the defendant is entitled to a trial for perjury before he can properly be punished for committing that offense."

Finally, it should not matter that Payne's attorney did exercise allocution at the second sentencing (P.C. 62) and that Michigan law prohibits an increase of sentence premised on the absence of remorse, *People v. Bottany*, *supra*, for Circuit Judge Hadsell, upon imposing the minimum and maximum terms of Payne's first sentence, considered the possibility that Payne might lose his sense of remorse, stating: "The sentence that I am about to impose on you will give you hope of returning to society after a—what I consider a reasonable length of time, *providing that you are honestly desirous of reformation* . . ." (P.C. 61, emphasis added).

Thus it should be quite apparent that the absence of expressed remorse should have played no part in Judge Byrns' decision to increase Payne's sentence following reconviction.

B. In the Absence of the State of Michigan Asserting Any Valid Reason Justifying the Increased Sentence the Conclusion Is Inescapable that Judge Byrns Vindictively Punished Payne for Exercising His Right To Appeal.

As is apparent from argument, IIA, *supra,* the State has not asserted any constitutionally legitimate reason for increasing Appellee Payne's sentence. In the absence of any justifiable reason for increasing the sentence, it must be concluded that such an increased sentence was unwarranted, vindictive, and punishment for the assertion of a right to appeal. As Judge Thomas M. Burns noted in dissent in *People v. Payne,* 18 Mich. App. 42, 47 (1969):

> "The selfserving declaration of the sentencing judge that he was not imposing a harsher sentence because defendant had appealed and that he was giving the defendant credit for time served does not change the practical realities of the situation."

Only under the rarist circumstances would a sentencing judge state for the record that he is punishing a defendant for exercising his right to appeal. Necessarily, then, vindictiveness must be shown by an analysis of the circumstances surrounding the imposition of the increased sentence.

The absence of valid reasons justifying an increased sentence is the situation dealt with in *Pearce.* It is clear that a stated purpose of vindictiveness would require vacation of such a sentence. However, *Pearce* was not intended to remedy this situation. *Pearce* was specifically designed to remedy the situation where no constitutionally legitimate reasons are given for the increased sentence.

In pre-*Pearce* situations the reasons for the increased sentence are obtained by the record supplementation procedures as utilized in this case below and, for example, in *Moon, supra, Odom, supra,* and *Commonwealth v. Allen, supra.* In the post-*Pearce* situation the reasons must clearly be made part of the record at the time of sentence imposition.

Therefore, when *Pearce* is applied and no constitutionally legitimate reasons justifying the increased sentence are found, it must be presumed that the sentence was vindictive and was punishment for the assertion of a constitutional right.

III.

IF *PEARCE* IS HELD NOT APPLICABLE, THIS CASE SHOULD BE REMANDED TO THE MICHIGAN SUPREME COURT FOR A DETERMINATION OF PAYNE'S DUE PROCESS CLAIMS UNDER THE CONSTITUTION OF THE STATE OF MICHIGAN.

The Michigan Supreme Court in its opinion, *People v. Payne,* 386 Mich. 84, 97 (1971), stated that because of their disposition of the case under *North Carolina v. Pearce, supra,* they were not considering Payne's due process arguments under the Michigan Constitution, Michigan Constitution of 1963, Art. 1, § 20.

It is also important to note that Payne's case was pending on appeal at the time Pearce was released. [See argument ID, *supra*]. On appeal in the Michigan Court of Appeals, Payne raised the question of whether his due process rights had been violated. His case was based on prior Michigan authority, *People v. Mulier,* 12 Mich. App. 28 (1968). In the majority opinion, the Michigan Court of Appeals found *Mulier* did not control this case because

the second-sentencing judge had the opportunity to learn facts about the crime which the first sentencing judge had not known, *People v. Payne*, 18 Mich. App. 42, 45. As we have shown in Argument IIA, *supra*, this was erroneous.

Therefore, if *Pearce* is found not to apply to the case, because the Michigan constitutional issue was not treated by the Michigan Supreme Court and because the Michigan Court of Appeals was factually erroneous in its finding that *Mulier* did not apply, this case should be remanded to the Michigan Supreme Court for a further determination.

Because Appellee has shown that there is an independent state grounds for the vacation of his second sentence, this case should be remanded for such a determination. This procedure comports with the procedure adopted in *Aikens v. State of California*, 406 U.S. 813, 32 L.Ed.2d 511, 92 S.Ct. 1931 (1972).

CONCLUSION

The Michigan Supreme Court should be affirmed by holding *North Carolina v. Pearce* retroactive and controlling of this case. In the alternative this case should be remanded to the Michigan Supreme Court for a determination of whether there exists independent State grounds for reversal.

Respectfully submitted,

By: /s/ James P. Neuhard
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RICHARD S. McMILLIN
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Of Counsel

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*We wish to acknowledge the assistance of Alan D. Smith in preparation of this brief.

APPELLEE'S APPENDIX "A"

TRANSCRIPT OF HEARING ON APPELLEE'S MOTION FOR PRODUCTION OF PRE-SENTENCE REPORT

STATE OF MICHIGAN
In the Circuit Court for the County of Berrien

PEOPLE OF THE STATE OF MICHIGAN	)
vs.	) Case No. X-751
LEROY PAYNE	) Date: December 18, 1972
Defendant	) Action: Motion to Produce Pre-Sentence Report

APPEARANCES:

HON. CHESTER J. BYRNS, Circuit Judge

Atty. John Smietanka, Asst. Prosecuting Atty.

Atty. Dennis Benson, Atty. for Defendant

THE COURT: This is the matter of the People of the State of Michigan v. Leroy Payne, which in Berrien County has the number X-751, and this case now is before the United States Supreme Court, whose number—if I'm wrong, I will stand correction—is 52618-½.

MR. BENSON: No, I believe that is the Michigan Supreme Court number.

THE COURT: That is the Michigan [2] Supreme Court.

MR. BENSON: The Supreme Court number is 71-10050.

THE COURT: All right. Thank you. This afternoon representing the People in this matter is the Chief Assistant Prosecutor, John Smietanka, and representing the Petitioner, Mr. Payne, is, excuse me, Mr. Dennis Benson of the State Appellate Defender's office.

The record should show that the State Appellate Defender's office through Mr. Benson, who is an assistant defender, has filed a motion or a petition with this court for the court to make disclosure of and production of the pre-sentence report on Leroy Payne.

I'm going to regard this in a broader sense that you are asking for not only the original pre-sentence report when he was first convicted and sentenced, but also the second one.

MR. BENSON: The motion, I think, your honor includes both pre-sentence reports.

THE COURT: All right. The prosecutor through Mr. Smietanka resists the motion.

The record should show that off the record there has been considerable argument between counsel [3] in the presence of the court, each maintaining their various points; that further Mr. Benson has filed a memorandum of law in support of his motion, which I have read, and unless there's something further, the court is ready to rule on the particular matter.

MR. SMIETANKA: Nothing further.

THE COURT: Nothing further. The court makes reference to Michigan Compiled Laws Annotated 791.229, reading in part as follows:

> "All records and reports of investigations made by probation officers, whether state or local, for courts of criminal jurisdiction in cases referred for such investigation by such courts, and all case histories of probationers are hereby declared to be privileged or

confidential communications not open to public inspection. Judges and probation officers shall have access to such records, reports and case histories. The probation officer or the assistant director of probation, or his representative shall permit the attorney general, the auditor general and law enforcement agencies to have such access. The legislative intent is that the relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate."

[4] The State Appellate Defender, with all due respect and credit to it, is neither a judge nor probation officer nor police officer or auditor general, etc.

MR. BENSON: Your honor, for the record, if I may, I'd like to say that I did inform the court of our position on Malkowski, People v. Malkowski.

THE COURT: It's in your record.

MR. BENSON: The recent case of the People v. Chappell.

THE COURT: Your memorandum and law are here, and now the court is disposing of it by way of opinion.

This court does not read as mandatory in this state the furnishing to a defendant or an appellant or his counsel the pre-sentence report. I say this not because there is anything this court is trying to hide in these pre-sentence reports. This court has followed a policy generally in sentencing to tell the defendant exactly what it is in the pre-sentence report that has influenced him and to give the defendant the opportunity to explain or to correct.

In the matter of Payne, to the best of this court's memory, this court set forth at the time of sentencing the reason why the sentence the court was giving to Mr. Payne [5] was what it was, which also has been supplemented by an affidavit or affidavits by this court

subsequently. This court at that time noted that as far as it knew his record while in confinement was good and that was what prevented this defendant from having even a longer sentence, but this court, as I remember, without going into what is already part of the record, was greatly influenced by the brutal details of the crime which it had over three days, plus its own impression of the defendant during these days, plus its impression of his testimony during those days of trial.

Now, I do not read the cases cited by Mr. Benson as mandatory in this state that trial judges make available to the defendant or appellant or his attorney any part or all of the records. There is a confidential relationship, as the statute shows, and this is one statute that actually expressly states what the legislative intent is, and that confidential relationship is between the probation officer and the defendant. The defendant might be willing to waive this confidential relationship, but not so the probation officer who deals with the defendant's family, his employers, his friends, the victims of his crime, law enforcement agencies, and because people know that the information that they supply to a pre-sentence officer is [6] privileged and confidential, they are willing to give such information, but once they know that that no longer is privileged and confidential, they are not going to give it to the pre-sentence officer or, as he's also known, as he wears two hats, the probation officer.

It would take a direct ruling by the legislature changing its own statute or by the Supreme Court in the name of judicial interpretation changing the statute for this trial court to make available to anyone other than those authorized in this statute a pre-sentence report.

It is this court's opinion that if such a rule came out, that this would be the most damaging thing that could

happen, and one might say to society, but, no, I would say to the defendants because it is from these pre-sentence reports that the judge is able to get an understanding of the character of the individual involved, an understanding of what is the best disposition for him, and without these reports being confidential, a judge will be shooting from the hip, which was something that many years ago before any of us were practicing law was avoided when the pre-sentence system began. So those that fight—I don't mean you personally, Mr. Bensor, for I have high regard for you—for those who fight to say to make pre-sentence reports [7] available in the name of due process, in the name of kindness or whatever other name that you want to use or clause that you want to claim, actually will do harm. Pre-sentence reports as a result of such a ruling or such a directive, I think, would probably turn out to be very brief and not helpful to either the court or the defendant or the community or anyone else.

It would be very easy for me in this matter of the People v. Payne to say to you—and you made this nice trip here and I appreciate it and I'm glad you made it in such a beautiful day, not in the snowstorm—"Go and take these reports because, after all, this matter is in the United States Supreme Court; they're working on it; there's nothing in those reports that I'm afraid of or that I'm trying to conceal," but once I do that, then I have violated what I believe to be the law in this state.

This court is mindful of the fact that over a year ago the Supreme Court of Michigan put out a proposed rule that was going to make these pre-sentence reports available and is also mindful of the fact that practically every sentencing judge in the state objected, and the

Supreme Court has never published or made that rule of a year and a half ago, proposed rule, never made it effective, which would [8] indicate to me that that Supreme Court is interpreting this as not mandatory. If they publish the rule, then they must take the responsibility from the standpoint of the defendants, the courts and society for that rule. That is not for me; I don't have that responsibility, but I do have the responsibility to apply this law and the tradition and the custom which I know has always existed in this state, and even though it would be easy in the Payne case to overlook it, I cannot do it.

Now, if the United States Supreme Court or any judge above this court orders those records produced, it seems to me under the statute they have the right to do it and there wouldn't even be any need to ask me for it; they can just send for it; they can have it and then they take the responsibility for either giving their own interpretation to this legislative intent which says that the preservation of the relationship of confidence between the probation officer and the defendant must remain inviolate; that they have in the name of legislative interpretation violated that intent, which is their privilege, and they have done their own legislating or in the name of due process providing that this provision is unconstitutional, but I don't think it is looking at its broad aspects. If it was a matter of dis-[9]cretion with this court, I still would not grant it because I think greater evil and harm will come from it.

So I will deny at this time the motion brought by the Appellate Defender on behalf of Mr. Payne, and he may make such appellate review of this as he wishes, and the prosecutor will prepare a brief order to this effect.

MR. BENSON: I have one.

THE COURT: Or if there is one here, I want that order to show that an opinion was given from the bench and I want that opinion to be part of this ruling so that if somebody is reviewing it they know this is not—this word "vindictive" I have heard all during the Payne matter instead of the word "principle," but they won't feel I am a vindictive old man, which I hope I'm not.

MR. BENSON: Your honor—

THE COURT: Yes.

MR. BENSON: If the transcript of the proceedings is needed, can we obtain one then?

THE COURT: Off the record. (Discussion off the record.)

THE COURT: Of course, Mr. Benson, of the Appellate Defender's office may buy such a copy, and the court reporter will be glad to make a copy of it.

APPELLEE'S APPENDIX B
EXCERPTS FROM TRIAL OF LIONEL BRADFORD
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* * * * *

[2] VICTOR YOST

A witness called by and in behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

[3] DIRECT EXAMINATION

BY MR. LANGE:

Q. Will you state your name, please? A. Victor Yost.

Q. Where do you live, Mr. Yost? A. Berrien Springs.

Q. What is your occupation? A. Deputy sheriff.

Q. And how long have you been a deputy sheriff in this county? A. 18 years.

* * * * *

Q. And on the day in question, the 5th day of November 1962, were you with anyone else, any other officer? A. Yes, I was.

Q. And who was that officer? [4] A. Special deputy Charles Plummer.

Q. And at about 3:45 A.M., where were you in connection with your duties as a police officer of this county? A. I was on M-139 and Napier Avenue.

Q. And you were in an automobile, I take it. A. I was.

Q. What kind of a car was it? A. A 1961 Plymouth, I believe.

Q. And is it a regular marked patrol car? A. No, it is unmarked.

* * * * *

Q. Were you driving the car on that occasion? A. I was.

Q. Where was Officer Plummer riding? A. A passenger in the front seat.

Q. Will you tell the court and jury in your own words what happened, beginning there at the intersection of M-139 and Napier Avenue? [5] A. I was checking out Louie's Tavern.

Q. Will you describe what you mean by "checking out?" A. Well, it had been burglarized a week prior, a burglary there, and I checked it to see if the building was secured, and when we found out it was, we started to leave the building, or the front of the driveway. The building was secured. I started to turn around and head back towards the Harbor.

Q. What happened then? A. I observed a car coming from across the front of me. My headlights shown on the car, and I proceeded to follow that vehicle.

* * * * *

Q. Do you recall the route by which you followed it? A. Yes. I followed it north on M-139 to Pipestone Road. There, it turned into the city and I proceeded to follow it.

Q. Approximately how closely were you following this car? A. Well, it varied at times. As I followed it I was throwing [6] the spotlight on the buildings along 139, and we got as far as maybe six or eight feet away, to 25 to 30 feet away.

Q. Did you attempt to stop this automobile? A. I did.

Q. And approximately where did that take place, Officer? A. It was in the city of Benton Harbor, near the Mercy Hospital. I imagine two blocks from the Mercy Hospital, towards the city, towards the business district.

Q. That would be north of Mercy Hospital? A. Yes.

Q. And will you tell the court and jury what was done by you and Officer Plummer to stop this Pontiac automobile? A. I pulled up alongside of it and sounded the siren and threw a spotlight on it. Also, Plummer had a

hand red light that plugged into the cigarette lighter, and he put it in the driver's window, and the car started to stop, and we stopped, too.

Q. After the Pontiac automobile stopped, Officer, where, in relation to the Pontiac, did you come to a stop? A. I was in back of it, I would imagine 3 or 4 feet, and before I got out of the car I put my spotlight through the rear window, which is quite customary.

Q. That was the spotlight that was built into the automobile? [7] A. Yes, sir.

Q. And did you notice anything as you shined the spotlight into the rear window of the Pontiac automobile? A. Yes, I did.

Q. What did you see? A. I seen two subjects in the car.

Q. What direction were they facing at that time? A. Well, they were—when I first stopped they were both facing towards the front of their car, but the one turned around and looked.

Q. Which one turned around and looked? A. The passenger.

Q. Now, Officer Yost, I ask you to tell the court and jury whether or not that man is present in court here today. A. He is.

Q. Where is he? A. He is on the right side of his counsel.

Q. Now, Officer Yost, after you made the observation that you just testified about, in the light of the spotlight, what happened then? A. I proceeded to get out of the car; also Plummer, and as I neared the front of my car the driver jumped out and started shooting at me.

Q. Did you have your gun drawn as you approached the car? [8] A. No, I didn't.

Q. Did you have anything in your hand? A. Nothing.

Q. Did you make an observation of Mr. Plummer going up to the other side of the car? A. I seen him going up to the side.

Q. Do you know whether or not he was carrying any arms? A. Nothing, I believe, other than a flashlight, which I had, also.

Q. You had a flashlight also? A. I did.

Q. Did you use the flashlight? A. I didn't get a chance to use anything.

Q. And you say suddenly the door opened? A. It did.

Q. Then what happened? A. A fellow jumped out of the car, and I seen the gun, I suppose, at the time, starting off, and I threw myself sideways, and I went down in a hail of bullets.

Q. Do you know how many times you were struck with shots on that occasion, Officer? A. Four times.

Q. You fell, naturally? A. I did.

[9] Q. What do you remember after you had fallen to the ground? A. I seen the car driving away, and—or I observed this man that shot me running around, and I was lying on the ground. I tried to get my service revolver out, but I was hit in the left arm, and I am left-handed, and it rendered it useless. I finally got my gun with my right hand, and I shot, but where, I hit, I am not sure.

Q. You did fire a shot? A. I emptied my gun.

Q. Do you recall seeing Charles Plummer after you had been shot? A. Yes.

Q. What happened in that connection? A. Well, I heard Plummer say, "Give me your gun. This man is coming back," and the man wheeled then and ran back to his car and drove away, and I told Plummer to chase him; not to let him get away.

Q. Do you know whether or not Officer Plummer did then leave the scene? A. Yes, he jumped in the car, as I directed him to do, and chased the car.

* * * * *

[11] CROSS-EXAMINATION

BY MR. McQUILLAN:

* * * * *

[20] Q. Now, between the time of the shooting on November 5th, and December 20th when you identified Mr. Bradford, isn't it true that you had occasion to read newspaper accounts of this incident, the shooting incident? A. Oh, I suppose.

Q. And isn't it true that in so doing you observed Mr. Bradford's picture in the paper, as one of the suspects? A. I don't know. I don't think I seen a newspaper until long after I was out of the hospital.

Q. And do you recall when you were discharged from the hospital? A. I am not sure, but I think I was there 18 or 20 days.

Q. That would be right around Thanksgiving time then. A. Yes.

* * * * *

[26] LUTHER ZICK

A witness called by and in behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

[27] DIRECT EXAMINATION

BY MR. LANGE:

Q. Will you state your name please? A. Luther Zick.

Q. What is your occupation? A. A physician and surgeon.

Q. Where do you reside, Dr. Zick? A. St. Joseph.

* * * * *

Q. And were you practicing your profession on the 5th of November of this year? A. Yes.

Q. And on that day, in the course of your practice of medicine and surgery, did you have occasion to examine and treat one Charles Plummer? A. Yes, I did.

Q. And do you recall the circumstances under which you [28] first came into professional contact with him? A. Yes. It was early in the morning. I had a call around about four in the morning from the emergency room at Mercy Hospital. I was asked to come down there and see Mr. Plummer because he had been shot, and in my amazement I wondered why and how, but I said, "Fine, I will be there." So we got down there to the emergency room. Mr. Plummer was lying on the examining table in the emergency room at Mercy Hospital. He was conscious, cooperative. He had two bullet wounds; one through his right shoulder. It was fortunately a flesh wound. It had formed a tunnel, a through-and-through tunnel through his right shoulder. That did not concern us so much as the second wound. There was a bullet hole in his left flank, and while there was an entrance wound, there was no wound of exit, so we knew that he had a bullet in him. He was taken to X-ray and the bullet was seen to be very deeply placed, either adjacent to or actually within the spine. This was early in the morning, about 6:00. We went into the operating room, and I assisted with the care of Mr. Yost, and later in the morning we went ahead and took Mr. Plummer to surgery, and at surgery Mr. Plummer had the bullet, as shown on the X-ray, lodged within his 4th lumbar vertebra.

[29] Q. That is part of the spine, is it not? A. Yes. And he is actually most fortunate to be here. An inch forward and he'd have hit his large vessels and he'd have bled to death. An inch posterior to that point and he'd have been paralyzed, so he was just lucky.

Q. Was that bullet removed? A. Yes, it was removed.
Q. Who did the removal, Doctor? A. I did.

* * * * *

[32] CROSS-EXAMINATION

* * * * *

Q. I see. Now, after the surgery that you performed on Officer Plummer, was he then returned to a hospital room. A. Yes, he was. Actually, they are usually taken to the recovery room, which is, of course, a hospital room, but not his room. After they recover, they are then taken to their own room.

Q. And how long did Mr. Plummer remain in the hospital, do you know? A. It was about a week.

Q. And how long after the surgery did Mr. Plummer regain his faculties, if you know? Continuing the question, first of all, as I understand it, he was operated on early Monday. A. Yes. We actually had him sitting up that evening, and we had him standing the next day, and he began walking around. We try to encourage early ambulation.

Q. And would you state that in this case he did regain his faculties relatively soon after the shooting then? A. I would say that he did very well.

MR. McQUILLAN: Thank you,

* * * * *

[34] REDIRECT EXAMINATION

* * * * *

Q. Doctor, can you describe in a little bit more detail these two wounds on the body of Charles Plummer? Let's take the shoulder wound, the through-and-through wound first. Where was it located? A. It was located right over the point of the shoulder. In fact, if it had been out,

if the bullet had gone out several inches laterally, it would have missed him. Conversely, of course, if it had gone in several inches more, medically, it would have gotten him in the base of the neck, which would have been a very serious wound.

Q. Can you describe the approximate size of the wound for the court and jury? A. Well, there was a tunnel that was probably an inch and a half to an inch and three-quarters long. At its greatest depth it was probably half an inch.

Q. And that would be then the so-called shoulder wound? A. Yes.

Q. It actually tunnelled through the flesh? A. Yes.

Q. And how about the other wound? Where would that have been located? A. The other wound was located in the left flank. There was [35] only one wound there, the one of entrance, with no wound of exit, as mentioned before.

Q. Can you describe the approximate size of that wound to the court and jury? A. Yes. That wound would be probably just a little under—between three-eights and a half an inch, I would say.

MR. LANGE: I have no further questions.

RECROSS-EXAMINATION

BY MR. McQUILLAN:

Q. As I understand you, Doctor, then it did appear to you that both wounds were approximately the same size? A. I would say so, yes.

* * * * *

[37] LEROY PAYNE

A witness called by and on behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

[38] DIRECT EXAMINATION

BY MR. LANGE:

Q. Will you please state your name? A. Leroy Payne.

Q. And how old are you, Mr. Payne? A. 23.

Q. And you are presently an inmate of the county jail? A. Yes, I am.

Q. Now, Mr. Payne, you have been charged and have pleaded guilty in this court to the crime of assault with intent to murder Officer Yost, is that correct? A. Yes.

Q. And did you have counsel in connection with that plea of guilty? Did you have a lawyer? A. Yes.

Q. What was the lawyer's name? A. Attorney Brown.

Q. And did Attorney Brown discuss with you at the time of your plea of guilty to the charge, or after your plea of guilty to the charge, your constitutional rights under the Fifth Amendment of the United States Constitution? A. Yes, sir.

* * * * *

[44] Q. Did you and Mr: Bradford have any conversation about your gun? A. Well, when I came into the house he asked me if I had my pistol.

Q. And what did you tell him? A. "Yes, sir," I did.

(Whereupon people's exhibit 3 was marked for identification.)

Q. Now, Mr. Payne, I show you this pistol which has been marked and tagged as people's proposed exhibit 3, for the purposes of identification, and I ask you to look at it and tell the court and jury if you recognize it. A. Yes, it looks like the gun that he had then.

(Whereupon people's exhibit No. 4 was marked for identification.)

Q. I show you this gun which has been marked as people's proposed exhibit 4, for purposes of identification, and I ask you to look at it and tell the court and jury if you recognize this gun. A. Yes.

Q. What is it? A. That's the pistol that I had.

Q. That is the pistol you had on the night we are talking about? [45] A. Yes, sir.

Q. Now, Mr. Payne, after you and Mr. Bradford had this conversation at his home relative to these guns, what happened then? A. Well, we left his house and got into my car.

* * * * *

Q. And where did you go? A. We headed towards South Bend.

Q. And how far did you get on the way towards South Bend? A. We went all the way to South Bend, sir.

Q. You and Mr. Bradford? A. Yes.

Q. And then what happened after you got to South Bend? A. We tried to break into a place called "Smoky's Grill" there in South Bend.

Q. Do you recall where Smoky's Grill was located? A. On Chapin Street.

Q. Were you able to do so? [46] A. Yes, we got into the place and tried to get the safe open, and a tear bomb went off inside the safe and we had to leave.

Q. A tear-gas bomb went off after the safe was opened? A. No, while we were trying to get the safe open.

Q. Then what did you and Mr. Bradford do? A. We left and headed back towards Benton Habor.

Q. Did you stop on the way to Benton Harbor? A. Yes, sir.

Q. And where did you stop? A. Oh, I think M-139, by Robert Hall's out there.

Q. By Robert Hall's? That is the store? A. Yes.

Q. And what did you do after you stopped the car near Robert Hall's store? A. Well, we parked the car in front of an automobile wreckage place, and went across the street and broke into Robert Hall's.

Q. Will you describe, Mr. Payne, to the court and the jury how entrance was made into the Robert Hall store? A. Through a side rear door.

Q. And was it necessary to use any tools in connection with this breaking and entering? A. Yes. We had to use two crowbars and a screwdriver.

[47] Q. And when you say "we," who was the other person or persons to whom you are referring? A. Lonnie Bradford.

Q. And after entrance was gained into the Robert Hall store, what, if anything, did you do? A. We grabbed quite a few clothes, and headed back towards the car.

* * * * *

Q. Who was driving the car away from the vicinity of the Robert Hall store? A. I was.

Q. And where was Mr. Bradford seated? A. Beside me, in the front seat.

Q. And what highway did you drive on? [48] A. M-139.

Q. And do you recall in what direction? A. Heading towards Pipestone.

Q. That would be towards Benton Harbor? A. Yes.

Q. Did you see a car commence to follow you? A. Yes, sir. At the red light there by the Plaza, a car made a U-turn from a straight, I guess it is there, and came in behind us.

* * * * *

[49] Q. Now, after you got on to Pipestone Street, what happened? A. Whem I made a lefthand turn off of M-139 to Pipestone, the car behind us made a turn, too. Lonnie Bradford asked me if the car was still behind us, and I told him, "Yes," and we continued on down Pipestone past Mercy Hospital about a block and a half or so, and the car behind us, the police car, put it's spotlight

in our back window and blinked his headlights and pulled us over, and I stopped.

Q. Mr. Payne, during the time that this car was following you, did you have any conversation with Lonnie Bradford about this car? A. Yes, sir.

Q. And what was that conversation? A. He asked me if the car was still following us, and I told him, "Yes."

Q. Then what did he say to you, if anything? [50] A. I don't remember him saying anything.

Q. Did you and he say anything about the guns at that time? A. We had talked previously about guns.

Q. You had talked about it previously that evening? A. I don't know if it was that evening. I think it was that evening that we talked about guns.

Q. What was said in that conversation? A. He said that he didn't intend to be taken, and that he would put five bullets in the same place before he would be taken.

Q. He would put five bullets in the same place? Is that what he said? A. Yes.

Q. Now, Leroy, as this police car came up to you, you said it shined its light. A. Yes.

Q. Do you recall what kind of a light it was? A. A spotlight, in the rear window of the car. It went back and forth, and then pulled up about half way of the car, and then fell back again.

Q. And this was on Pipestone Street? A. Yes.

Q. And you stopped the car? A. Yes.

[51] Q. What happened then? A. I don't know which one of us spoke at the time, but I seem to remember that it was said that "This is it," or something like that.

Q. The words "This is it," was spoken by one of you? A. Yes.

Q. And then what happened? A. The two detectives got out of their car and were walking up to my car, and

Lonnie Bradford and I jumped out of the car, firing at them.

Q. You jumped out of the car and fired at them? A. Yes.

Q. Can you tell the court and jury approximately how far away from you the detective on your side of the car was when you fired at him? A. When I got out of the door, he was a little past my rear fender.

Q. Did you watch what happened on the other side of the car? A. No, sir.

Q. Did you hear shots? A. Yes, sir.

Q. Did you hear any shots other than those that you fired? A. Yes, sir.

Q. Do you recall how many you may have heard? [52] A. No, I don't know.

Q. After you fired your first volley of shots, Leroy, what happened next? A. I turned around and started to get back into the car, and I was half in and half out, and I put my foot on the gas and I turned around, and I don't know—I got back out of the car.

Q. What did you do when you got back out of the car the second time? A. I started to walk back, I guess. I don't know for sure. I know I got out of the car, and I don't know how far I went, or what.

Q. Did you fire at anyone the second time? A. I don't recall, sir.

Q. Do you recall, Mr. Payne, whether or not any officer fired at you, or pointed a gun at you that evening? A. During this time, sir?

Q. Yes. A. Yes.

Q. And can you describe that, what happened, to the court and jury? A. When we started to fire, Mr. Yost, the detective, he started to fall back, and it seems to me he swung his right hand back like that (indicating) to reach

for his [53] gun, and the next thing I knew he was on the ground, and the other detective on the other side, I remember him firing, but I don't know exactly when.

Q. You remember him firing at you? A. When I got out of the car the second time, I remember I was standing there, and it seemed as if an explosion went off, or a fire was right in my face, and I remember thinking that–I don't know exactly.

Q. Did you hear a click as he had this gun in your face? A. I didn't hear anything, sir, but I did see this flash. It seemed like as if it was right in my face there.

Q. Were you injured? A. No.

Q. Now, Leroy, after this incident when you got out of the car the second time, what did you do? A. I turned around again, and half in and half out of the car, and pressed down on the gas, and made a lefthand turn at the first street I came to.

Q. And what did you do as you turned left onto this first street that runs into Pipestone? A. I went down one block, made a righthand turn, and another righthand turn into the alley there.

Q. What did you do as you drove up the alley? A. I pulled in behind a brick building.

[54] Q. Were your headlights on, or off, as you drove up the alley? A. Off.

Q. You pulled in behind a brick building, and what did you do there? A. I took all the clothing and the burglary tools out of the car.

Q. Do you recall where you placed the clothing? A. Beside this building.

Q. And what did you do with the tools? A. I placed them across the alley beside a garage.

Q. Then what did you do with your car, if anything? A. To my car?

Q. Yes, or with your car. Did you leave it there? A. Yes, I left it there.

Q. Then what did you do? A. I started running, after I left there.

* * * * *

[55] Q. And then what did you do? A. I went across Pipestone, and went two houses, and down into a ravine.

* * * * *

Q. And did you see Lonnie Bradford in that ravine? [56] A. Well, when I came down to the water I didn't know whether to cross it or not. It looked pretty deep, and I heard someone splashing along, and I called out to Lonnie Bradford and told him, "Don't shoot."

Q. And then what happened? A. I went out to where he was and give him my pistol, and kept on going across the ravine, and headed towards home.

Q. I show you the pistol marked people's exhibit 4 for identification, and ask you if this is the pistol you just testified about having given to Lionel Bradford. A. Yes, it is.

Q. After you gave your pistol to Lionel Bradford, where did you go? A. I headed towards home. I went up the other side of the ravine, and I don't know exactly the name of the street I came out on, but I headed towards Fair on the street, and about half a block before I hit Fair, I went down an alley parallel to Fair until I came to the Project.

Q. Is that where you live? A. Yes, sir.

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[60] Q. Were you fired at, Mr. Payne, as you drove away from the scene and down this street to the left? A. No. Well, when I was driving away, yes, but not after I made the left turn.

Q. You were fired at as you were going north on Pipestone, but as you made the left turn you weren't fired at any more, is that correct? A. Yes, sir.

Q. Now, Mr. Payne, were you subsequently arrested that morning? A. Yes, sir.

Q. Approximately what time were you arrested? A. About 4:30, sir.

Q. And were you sleeping at the time you were arrested? A. No, sir.

Q. Do you know what officers arrested you? A. No, sir.

Q. Can you tell the court and jury approximately how many officers arrested you? A. I guess about 15 or 20, I guess. I don't know for sure.

Q. It seemed like an awful lot of them? [61] A. Yes, sir.

Q. Where were you taken, Mr. Payne, after you were arrested? A. To the Benton Harbor police station.

Q. And were you taken from the Benton Harbor police station to any other place that morning? A. To Mercy Hospital.

Q. And what, if anything, happened at Mercy Hospital? A. I was taken in with another fellow for Mr. Yost to identify.

Q. Do you know who the other fellow was? A. I think they called him Jim Beam.

Q. And what happened there at the hospital? A. Somebody asked Mr. Yost if I looked like the fellow that had shot him, and he said that I looked like the fellow, but he didn't know for sure.

Q. He said you looked like the fellow that had shot him, is that correct? A. Yes.

Q. After that, what did the officers do with you? A. Took me back to the Benton Harbor police station.

Q. And what happened at the Benton Harbor police station, Mr. Payne? A. I was taken into the detective room there.

Q. What happened at the detective room at the Benton Harbor [62] police station? A. Det. Smith came in, and after a while, after I'd been there a while.

Q. What did Det. Smith do after he came in? A. He sent the other patrolmen out that was in the room, and told me, he says, "You are going to tell me the truth or I'm going to beat the living daylights out of you."

Q. All right, then what happened, Mr. Payne? A. I told him I didn't know anything to tell him.

Q. Then what happened? A. He started beating me in the face.

Q. He struck you? A. Yes, sir.

Q. Struck you on several occasions, is that right? A. Yes, sir.

Q. And then were you later taken from the detective room? A. Yes, sir.

Q. And where were you taken? A. To the county jail.

Q. Do you recall what officers took you from the Benton Harbor police station to the county jail? A. I remember Det. Casserly bringing me over. I don't know if there were any other officers.

[63] Q. And after you were brought over to the Berrien County jail, where were you placed? A. In the sheriff's office there. I think it's his office. I'm not sure.

Q. Well, is it a big room with a lot of windows, and four chairs on one side? A. Yes, it is.

Q. I think that's the sheriff's office. Leroy, how long did you stay in the sheriff's office? A. I don't know, sir.

Q. Well, did you stay there into that afternoon? A. After I went through that with Det. Smith, I began losing track of time. I couldn't say, sir.

Q. Some time that afternoon, Mr. Payne, were you given an opportunity to go to the washroom and wash up? A. That was the next day, sir.

Q. That was the next day? A. Yes, sir.

Q. Were you bruised? A. Yes, sir.

Q. Did you have a black eye? A. Both my eyes were black, sir.

Q. Did you have a cut under your right eye? A. Yes, sir.

[64] Q. Do you know how that cut was inflicted on you? A. Yes, sir.

Q. How? A. Well, before Det. Smith came in, another patrolman that was sitting there watching me, he was talking to me, and he said something and I told him that I always thought that a man was supposed to be innocent until he was proven guilty.

Q. Then what did he do? A. I guess when I said that it made him mad, and he took a swing at me, and he must have had a ring on his finger, because it cut me under the eye, sir.

Q. Now, Leroy, during this time, the first day, and I will call it the day of November 5th, 1962, did you admit to any police officer that you had anything to do with the shooting of officers Yost and Plummer? A. No, sir.

Q. Were you taken to the Municipal Court for the City of Benton Harbor that same evening? A. I think so, sir. I don't know.

Q. And were you there arraigned on the charge that you later pled guilty to? A. Yes, sir.

Q. Do you recall, Leroy, when you first admitted to police [65] officers that you had been involved in this incident? A. I think it was Tuesday or Wednesday. I know it was dark outside. I don't know if it was morning or afternoon.

Q. And was that Tuesday or Wednesday of the same week that we are talking about? A. Yes, sir.

Q. And can you tell the court and jury what day of the week the 5th of November was? A. Monday.

Q. So these incidents started to transpire early Monday morning, is that correct? A. Yes, sir.

Q. And you were arraigned, as near as you can remember, sometime that week? A. Yes, sir.

Q. And you finally admitted your part in this crime on what day? A. Tuesday, it might have been. I don't remember, sir.

Q. Did the officers question you, Mr. Payne, after you admitted your part in this crime, as to who your accomplice was? A. Yes, sir.

Q. And did you name any person? A. Yes, sir.

[66] Q. Whom did you name? A. Lonnie Bradford.

Q. Do you know whether or not Mr. Bradford was then arrested for investigation and brought to the county jail? A. I thought that he was already arrested, sir. I don't know when he was arrested.

Q. Did you see Mr. Bradford at the county jail? A. Yes, sir, I did.

Q. Can you tell us, Mr. Payne, approximately what day it was, after you had been arrested? A. Wednesday or Thursday.

Q. Wednesday or Thursday? Did you have any conversation with Mr. Bradford in the county jail on Wednesday or Thursday? A. Yes, sir.

Q. What was that conversation? A. I told him that I was sorry for he and I, and that I had told the police everything, and he asked me if I would call off someone else's name so that he could be released, and I told him that I couldn't take any more physical punishment, and he kept begging me to call someone else's name, so I

finally mentioned the name of John Perkins, I think it was.

Q. Did you really know a man by the name of John Perkins? [67] A. No, I didn't, sir.

Q. And you mentioned that name in the presence of Lonnie Bradford? A. Yes, sir.

Q. And then later on did you tell the officers that John Perkins was your accomplice? A. No, sir. I told them that John Perkins was a name that I had made up because Lonnie Bradford had pleaded with me to just name anybody so that he could get out of jail.

Q. And you say to the best of your recollection that was either Wednesday or Thursday of that week? A. Yes, sir.

Q. Now, Mr. Payne, after Wednesday or Thursday of that week, were you ever physically mistreated by any officer of the law? A. Yes, sir, after I mentioned this name.

Q. The name of John Perkins, you mean? A. Yes. I think it was the next day that Det. Smith and another detective—well, I was taken down to the interrogation room.

Q. And then they applied physical force to you? A. Yes, sir.

Q. Was the last time. A. Yes, sir.

[68] Q. Have you been physically mistreated in any way since the time that you just told us about, that Thursday of that week, I believe it was? A. No, sir.

Q. Are you presently under any fear of physical abuse? A. No, sir.

MR. McQUILLAN: Your Honor, I move that that be stricken from the record. We will let the facts indicate whether he is under any fear of abuse. At this time that's a conclusion of the witness.

THE COURT: He would be the only one to know. I don't know that it's material. Nobody else would know except him whether he is in fear of it or not. I will let the answer stand for whatever it may be worth at this point.

MR. LANGE: I have no further questions of this witness at this time, your honor.

(Recess taken.)

AFTER RECESS

CROSS-EXAMINATION

BY MR. McQUILLAN:

* * * * *

[70] Q. Now, witness Payne, you have already confessed that you attempted to murder Officer Yost in this affair, is that correct? A. Yes, sir.

Q. Now, in addition to this you have been in a little trouble before, haven't you? A. Yes, sir.

Q. Isn't it a fact, witness Payne, that you have admitted burglarizing the Eau Clair Fruit Exchange? A. Yes, sir.

Q. Isn't it a fact that you have admitted burglarizing the Blossom Lanes Bowling Alley? A. Yes.

Q. And Leonard's Super Market? A. Yes, sir.

Q. And the Woolworth store? A. Yes, sir.

Q. And Coon's Curve Standard Station? A. Yes, sir.

Q. And the United Distributors Company? A. Yes, sir.

Q. And Reinhart's Grocery? A. Yes, sir.

Q. Lakeshore Lanes Bowling Alley? [71] A. Yes, sir.

Q. And the Michigan Mart? A. Yes, sir.

Q. And the Babbitt Lumber Co? A. Yes, sir.

Q. And the Berrien Hills Country Club on more than one occasion? A. Yes, sir.

Q. And the M-139 Gulf Station? A. Yes, sir.

Q. And Nelson's Service Station? A. Yes, sir.

Q. The Airport Service Station? A. Yes, sir.

Q. The August Pohl Wreckers? A. Yes, sir.

Q. The Greenland Inn? A. Yes, sir.

Q. Territorial Auto Parts? A. Yes, sir.

Q. By-Rite Grocery? A. Yes, sir.

Q. Now, if my count is correct, Mr. Payne, that's 18 burglaries that you have admitted taking part in prior [72] to the shooting incident, is that correct? A. Yes, sir.

Q. As a matter of fact, you have burglarized more than 18, haven't you, in the past two years? A. Yes, sir.

Q. Can you estimate the number of burglaries you have been implicated in? A. No, sir, but it's more than 18. It seems so, sir.

Q. Isn't it an additional fact, witness Payne, that you have also admitted that on one occasion you pulled an armed robbery on the Dairy Queen Store in Benton Harbor? A. Yes, sir.

Q. In which one of the operators of that store was shot? A. Yes, sir.

Q. And haven't you also admitted attempting an armed robbery of the Cass Dairy Store? A. Yes, sir.

Q. Isn't it an additional fact, Mr. Payne, that prior to and at the time of the shooting you were using narcotics? A. Yes, sir.

Q. And as a matter of fact, the day of the shooting you were on narcotics, isn't that correct? A. Yes, sir.

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[73] Q. Now, you state you are married. A. Yes, sir.

Q. Now, isn't it a fact that in addition to the other crimes I have named off that you have committed adultery? A. Yes, sir.

Q. With a woman in South Bend? A. No, sir.

Q. Where was she from? A. Chicago.

Q. On more than one occasion? A. Yes, sir.

Q. Was there more than one woman? A. No, sir.

Q. Didn't you ask the police in your discussions with them, [74] after your arrest, not to inform your wife of your adulterous conduct? A. I don't recall asking the police that, sir.

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[76] Q. Now, isn't it a fact, Mr. Payne, that regardless of where you were that Sunday evening, that you were using narcotics? A. Yes, sir.

Q. Were you smoking marijuana cigarettes? A. Yes, sir.

Q. And after you claim you left Bradford's residence you say you went to the East End Bar in Benton Harbor? A. Yes.

Q. And you had some beer to drink there, didn't you? A. Yes, sir.

Q. And you say you went home at 10:00 from the bar? A. About that, sir.

Q. And isn't it true that after that time you also smoked some additional narcotics? [77] A. Yes, sir.

Q. Did you ever use heroin? A. No, sir.

Q. Marijuana? A. Yes, sir.

Q. Is that what you were smoking the night prior to the shooting? A. Yes, sir.

Q. Now, Mr. Payne, didn't you tell a different story as to [78] your whereabouts prior to your testimony in court here today? A. I don't understand you, sir.

Q. Isn't it true, Mr. Bradford, that you have previously stated that you did not return to Bradford's house until two in the morning, rather than midnight? A. Yes, sir.

Q. And to whom did you tell that? A. The police, sir.

Q. But you are changing your story here today? A. Yes.

Q. You are saying you went back at twelve o'clock? A. Yes, sir.

Q. And is it true that in a prior version of this incident you didn't even mention going to Souther Bend? A. Yes, sir.

Q. What's your answer? I say, you didn't mention that, or you didn't? A. This time. I have told the police prior to this time that we did go to South Bend, yes, sir.

Q. And you told a different story than that, didn't you, previously? Didn't you previously relate that instead of returning to Bradford's house at 12:00, and then going to South Bend, and then coming back, isn't it true, Mr. [79] Payne, that you have previously related that you didn't go over to Bradford's house until 2:00 in the morning, and that you went directly from his house and broke into the Robert Hall store? Didn't you tell that conflicting story prior to coming into court today? A. Yes, sir, I did, but–

Q. Just answer the question. You did, didn't you? A. Yes, sir.

Q. And you told that version as late as November 23rd of this year, did you not? A. I don't know the date, sir.

Q. To whom did you relate this version that I'm talking about? A. I don't know. I guess the last time that I was questioned, or the time before that. It's been quite some time that I did tell the police everything exactly.

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[81] Q. Now, Mr. Payne, you admit you shot Officer Yost? A. Yes, sir.

Q. And you also admit that you shot Officer Plummer, didn't you? A. Yes, sir.

Q. What kind of a gun were you using? A. 32.20, sir.

Q. I show you want's been marked for identification as people's exhibit 4, and ask if you can identify that. A. Yes, sir.

Q. What is it? A. 32.20 revolver.

Q. Is that the weapon that you used to shoot Officer Yost and Officer Plummer? A. Yes, sir.

Q. Do you know how many times you fired that pistol on that evening? A. No, sir.

Q. Is that a six-shot pistol? A. Yes, sir.

[82] Q. Did you empty it? A. I don't know, sir.

Q. How many times did you shoot Officer Yost? A. I don't know, sir.

Q. Four? Could it have been four? A. I was told later on it was four, but I don't know.

Q. How many times did you shoot Plummer? A. I don't know.

Q. Could it have been twice? A. I don't know.

Q. Is it possible? A. I guess so.

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[83] Q. Now, Mr. Payne, you said that you were arrested at approximately 4:30 A.M. that Monday morning, November the 5th, is that correct? A. Yes, sir.

Q. And you were arrested at your home? A. Yes, sir.

Q. And you said that from your home you went to the Benton Harbor police station? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. In a police car? A. Yes, sir.

Q. And were you handcuffed? A. Yes, sir.

Q. And in what fashion were you handcuffed? A. My hands were behind me.

Q. Behind your back? A. Yes, sir.

Q. When you got to the police station, were you immediately taken into the station? [84] A. Yes, sir.

Q. Now, prior to going in the police station, weren't there some officers standing around your car? A. I don't remember seeing any officers standing around the car.

Q. Did anybody call you any names? A. Yes, sir.

Q. Who? A. Some policeman there.

Q. Was that before you got out of the car? A. That was after they had taken me to see Det. Yost.

Q. Now, from the police station that first time, the Benton Harbor police station, were you taken up to Mercy Hospital? A. Yes, sir.

Q. Now, when you were taken to the hospital, Yost identified you, right? A. He said that he thought I looked like the fellow that shot him.

Q. Were you then returned to the Benton Harbor police station? A. Right.

Q. When you were returned to the police station, was there anything wrong with your face? A. No, sir.

Q. Anything wrong with any part of your body? A. No, sir.

Q. Were you then taken into the Benton Harbor police station to the detectives' room? A. Yes, sir.

Q. Before being taken into the police station, were you called any names? A. Well, after I was—after I left the hospital and was waiting to be taken back to the police station, I was, sir.

Q. That was out at the hospital? A. Yes, sir.

Q. Were there any police officers around the car? A. Yes, sir.

Q. And did anybody say anything to you? A. Yes, sir. They called me names.

Q. What did they call you? A. "Dirty bastard," "nigger," and told one of the policemen guarding me to take the cuffs off of me and push me out of the car and leave me with them and they could shoot me.

Q. Did that make you fearful? A. Yes, sir.

Q. Then you were taken in the police station? A. I was taken to the police station.

Q. And you were assaulted, as you have previously described? [86] A. Yes, sir.

Q. And how long were you in the detectives' room at that time? Do you remember? A. No, sir.

Q. Isn't it true that Det. Matt Casserly had to pull Lt. Smith off of you? A. Yes, sir.

Q. And you were then taken back to the Berrien County sheriff's office, is that right? A. Yes, sir.

Q. Now, you said you were abused at that time by the officers. A. Yes, sir.

Q. Will you describe to the court and jury, if you can, just what they did to you? A. I was sitting in a chair, and was handcuffed, and—

Q. Your hands were handcuffed behind your back? A. Yes, sir. No, they was in front of me at the time, and they were pretty tight, and the officers could see this, and they told me if I would start to talk they would take the handcuffs off. I wouldn't say anything, so they took them off anyway, and I was sitting in the chair with my arms like this on the armrests, and the officers questioning me, and I wouldn't say anything because of [87] the way they had treated me.

Q. What did they do to you? A. They grabbed my arm.

Q. Do you who they were? Can you identify them? A. Yes, I know the officers.

Q. Who were they? A. I don't know their names, but I know them when I see them.

Q. Now, if you would please describe to the court and jury what they did to you. A. At that time one of the officers grabbed my thumb, and the other one grabbed my other arm, and started twisting, and twisted so much that I couldn't sit in the chair, and I fell out.

Q. Twisting your fingers? A. My thumb back, at the time, until it popped. I thought it was broken, and then he started to twist my index finger and trying to get me to talk.

Q. Did anybody kick you? A. Only Det. Smith, when he was—when I was over to Benton Harbor.

Q. When you were at the Benton Harbor station? A. Yes.

Q. Where did he kick you, if you know? [88] A. In the body.

Q. Whereabouts on the body? A. Around the waist and the buttocks.

Q. Did he kick you in the crotch? A. No, sir. I tried to protect myself as much as I could by curling up in a ball.

Q. Now, returning to the sheriff's department, how long did this torture that you have described continue? A. One of them kept hollering for me to get back in the chair, and they were still twisting my finger, and then I—then they got me back in the chair.

Q. They fianlly quit? A. I don't know how long they did this. I was able to get back in the chair.

Q. You don't have any idea how long this went on? A. No, sir. I don't know for sure.

Q. Well now, after they stopped that, what did they do with you? A. I was taken into the next room, and the questioning was continued.

Q. How long did they continue questioning you? A. Until I confessed to these—

Q. That was the following morning, Tuesday morning? A. I don't know the exact time, sir.

[89] Q. This questioning continued, if I understand you correctly, all day Monday into the night, until into the morning on Tuesday? A. Some time Tuesday, sir. I don't know.

Q. Did they give you anything to eat on Monday? A. No, sir.

Q. Did they give you anything to drink? A. No, sir.

Q. Isn't it a fact that they told you they would give you something to eat and drink if you told them—if you told the police whether or not you shot the officers, and who your accomplice was? A. I was told I could have a drink of water if I talked, yes, sir.

Q. And you said that you were taken over to Benton Harbor to be arraigned at approximately midnight Monday? A. I know it was dark outside. I don't know what time it was.

Q. So that we get it straight here, you were picked up early Monday morning, and you were held all day Monday and questioned, and then was it Monday night that you were taken over to Benton Harbor to be arraigned before the judge? A. I don't know. It could have been Monday or Tuesday [90] night.

Q. Was that before you say you confessed? A. I hadn't confessed at the time I was arraigned.

Q. At the time you were arraigned, you hadn't said anything as to who was involved, right? A. Yes, sir.

Q. And isn't it a fact that you were arraigned at approximately ten o'clock Monday? A. I know it was late at night, sir.

Q. Late at night Monday evening? A. Yes, sir.

Q. All right. After they took you over to be arraigned, where did they take you then? Back to the sheriff's department? A. Yes.

Q. What then? A. I was questioned some more.

Q. And how long did that questioning continue? A. Until I confessed.

Q. And until you implicated Mr. Bradford, is that correct? A. Well, until I told everything, sir.

Q. And that was at approximately five o'clock A.M. Tuesday morning? A. I don't know the time, sir.

[91] Now, all this time, that is, from the time you were arrested until the time you confessed, did you have any sleep? A. No, sir.

Q. They wouldn't let you sleep? A. No, sir.

Q. Were you standing up most of the time? A. Part of the time, sir.

Q. I want to get this one point clear, Mr. Payne. Did you implicate Mr. Bradford at the same time that you confessed, as being involved? A. Yes, sir.

Q. All right, now, after that what happened? A. After I confessed?

Q. Yes. A. I was put in a cell.

Q. Do you know what day that was? A. No, sir.

Q. How long did you stay in your cell? A. I don't know, sir.

Q. Did they later take you out of your cell? A. Yes, sir.

Q. When was that? A. Some time later on. I don't know if it was daylight or [92] not.

Q. You don't know if it was day or night? A. Not right now, sir, I don't know, sir.

Q. How long were you in your cell, do you know, before they took you out again? A. I went to sleep, sir, and no sooner was I in the cell when I was woke up.

Q. They came back and got you a short time later? A. I don't know how long it was.

Q. What did they do with you then? A. I was questioned by some state troopers. I was put in the interrogation room and questioned by some state troopers.

Q. What did they question you about? A. They questioned me about the shooting.

Q. Well, could you be more specific, if you know? A. Well, they told me that they weren't involved in the case.

Q. That what? A. That they weren't involved in the case, and that they just wanted me to tell them what happened so they would know for themselves.

Q. This was after you implicated Bradford? A. Yes, sir.

Q. What, if anything, else happened when the state police [93] were in the room with you? A. I told the state police that I had told the sheriff everything that I knew, and that I didn't know any more to tell them than what I had said, and they told me that was all right, that they just wanted me to tell them anyway, and I was sitting there, and I didn't know what to say or anything, and they told me if I didn't start talking that they were going to squeeze my groin, my sack, until I passed out.

Q. You mean your private parts? A. Yes. They told me they'd do this three times, if I didn't start talking. I didn't know what they wanted me to talk about, since I'd already told the sheriff everything, and so they—I was just sitting there and they told me to stand up, and I stood up, and one of them grabbed me around my arm and twisted it behind me, and threw me across the desk, and the other one reached for my privates and started to squeezing and told me I'd better start talking right then and there.

Q. One of those state troopers grabbed you in the private parts and squeezed you there? A. Yes.

Q. What happened after that? A. I just told them the same thing that I had told the [94] sheriff.

Q. How long did they keep you in there at that time? A. I don't know, sir.

Q. And what happened to you after that? A. After I told them everything, one of them walked out of the room and the other one was sitting there talking to me. He told me they didn't want to hurt me but they just wanted to know everything that happened, and that was

all there was to it, and while he was talking to me I heard a recording of everything that I said to them played back, and afterwards I was taken back to my cell.

Q. All right. Now, do you know what day of the week this was? A. No, sir, but I do remember it was dark.

Q. What happened after you were taken back to your cell, witness? A. I was left there.

Q. And for how long? A. I don't know, sir.

Q. When was the next time they took you out of your cell? A. When I was taken down to talk to Lonnie Bradford at the sheriff's department.

Q. Do you know what day of the week that was? A. No, sir.

[95] Q. You have no idea? A. I guess it was Wednesday or Thursday.

Q. Let's digress one minute here, witness. Prior to the time that you implicated Bradford, isn't it true that you saw Bradford over in the sheriff's office? A. Yes. This is the time I was speaking of, but I had confessed to everything and told everything.

Q. You claim that was the first time you saw Bradford? A. Since he was arrested?

Q. Yes. A. Yes.

Q. You knew Bradford before this happened, didn't you? A. Yes, sir.

Q. You said you had known him about five months prior to this time? A. It could be more or less; around there, sir.

Q. And in other words you are saying you knew Bradford about two months prior to this shooting? A. About that. I don't know, sir.

Q. How long had you known this Charlie Hawkins, this fellow that was pulling all these burglaries with you? You knew him quite a while, didn't you? A. Well, I went to school with him.

Q. You went to high school with him? [96] A. Yes, sir.

Q. He was a pretty good friend of yours? A. Not at the time, sir, no.

Q. All right now, what happened after this incident when you claim you were talking with Bradford at the police station? Did the police mistreat you at any time after that? A. Yes, sir.

Q. When was that? A. The next day.

Q. That would be on a Thursday? A. I guess so, sir. I'm not sure.

Q. What heppened then? A. That was when Det. Smith and the other detective came in and questioned me again.

Q. Where was this? A. In the interrogation room in the county jail building.

Q. Tell the court and jury if you can what happened at that time. A. I was sitting on a couch that they have there, and the two detectives came in and started questioning me and told me that I was going to tell the truth and that they didn't want any lies told, and I told them that I had already told the truth, and they said–I guess they [97] didn't believe me–and one grabbed me and held me down while the other grabbed my privates again and started squeezing, and I started hollering that I had told the truth.

Q. All right. What happened after that? A. Well, they thought they–they said something about the name Perkins, the name that I had mentioned while I was with Lonnie Bradford, and I told them the only reason I had mentioned the name to Lonnie Bradford was that he kept asking me to just call anybody's name so he could get out again.

Q. Incidentally, where did this conversation take place? A. In the interrogation room.

Q. And weren't you aware of the fact that that interrogation room had been bugged, so to speak, so that people could hear your conversation outside the room? A. Yes, sir.

Q. And you were aware of that when you were talking with Bradford? A. Yes.

Q. And did Bradford tell you he was aware of that? A. Yes.

Q. And you still claim that Bradford at that time was telling you to blame somebody else? [98] A. He didn't speak orally sir. I mean—well, he talked, but in a low tone, and while, in a way that they couldn't understand.

Q. But you knew the room was bugged. A. Yes.

Q. You still claim you talked about that in that room? A. Yes, sir.

Q. All right. After the last meeting that you described, which was, as I recall, was on a Thursday— A. I guess so, sir.

Q. What happened after that? A. I told them the reason that I had called the name of John Perkins, and—

Q. And you were beat up, as you just described, right? A. I was telling them that I had told the truth, and the reason why—the only reason I had called that name was that he had asked me to.

Q. All right. After that meeting were you taken back to your cell? A. Yes, sir.

Q. And your claim is that you hadn't been beat up since then? A. Yes, sir.

Q. And isn't it also true that since then you haven't named [99] anybody else but Bradford? A. Yes, sir.

Q. Now, you have been in the custody of the sheriff department since the arrest, correct? A. Yes, sir.

Q. Now, do you remember when you were taken over to Benton Harbor to court for an arraignment? And this,

I believe, was in the early part of the week, late at night, as you said? Do you remember that occasion? A. Yes, sir.

Q. Now, prior to your going upstairs to be arraigned in the Benton Harbor court building, did you have any conversation with a Mr. Lake from the prosecutor's office? A. Yes, sir.

Q. And where did that take place? A. In the Benton Harbor detectives' office.

Q. And who was present? A. He and I were present.

Q. Will you tell the court and jury as closely as you can what was said by Mr. Lake on that occasion? A. Well, he told me I'd better start telling the truth, and that if I tried to fight this thing that he was going to see that my wife was prosecuted for perjury [100] and that our children were taken away.

Q. And that was before you confessed to this incident? A. Yes.

Q. And it was before you implicated Bradford? A. Yes.

Q. Now, witness, isn't it true that you told the police on at least one occasion, and possibly more, that you had never signed a statement against Bradford or never testified against him? A. I don't recall saying that, sir.

Q. Is it possible you could have said it? A. I think I remember saying that I don't wish to testify against Bradford, but I don't wish to testify against anyone.

Q. You told the police that you didn't wish to testify against Bradford, is that correct? A. Yes, sir.

Q. And isn't it also true that as late as November 23rd, on the occasion when you gave a statement to your attorney, that you told him you didn't wish to testify against Bradford? A. Yes, sir.

Q. Now, isn't it true that—first, I want to pinpoint something here, witness. I am referring to the statement

[101] that you made to your attorney, which was transcribed by the lady that was present, and that you said you read. Do you have the statement in mind? A. Yes.

Q. And that's the same statement that you gave your lawyer written permission to show to me, is that correct? A. Yes, sir.

Q. And isn't it true, Mr. Payne, that in that statement, when it was suggested to you that you might draw some leniency in your sentence if you testified against Bradford, that you then indicated you would testify against him? A. I said I didn't know, sir.

Q. Do you know where that statement is? Does your lawyer have it? A. No, I don't, sir.

Q. I am asking you directly, isn't it true that one of your reasons for being up here and testifying is that you hope to get a lighter sentence? A. No, sir.

Q. You are saying that that is not true? A. Yes, sir.

Q. That you never made a statement to that effect? A. If I could clarify something–

[102] Q. I am asking you to answer the question that I'm asking. You deny that you ever made a statement to that effect? A. Yes, sir.

Q. You deny it? A. Yes, sir. If I could explain something. When I was asked–

Q. I am not asking you to explain. You'll have a chance to do that. I am asking you to answer my question. A. Yes, sir.

Q. You haven't answered the question. A. No, sir.

Q. How long ago did you plead guilty? A. I don't know the exact date.

Q. Is it over a month ago? A. I guess so, I don't know.

MR. MC QUILLAN: That's all I have, your honor.

* * * * *

REDIRECT EXAMINATION

By Mr. Lange:

* * * * *

[104] Q. Now, Mr. Payne, Mr. McQuillan, on cross-examination, claims that there was some differences or discrepancies in these stories. Can you explain any of these alleged discrepancies? A. Yes, sir.

Q. Will you do so, please? A. When I first confessed, it was more or less under a pressure basis, and I didn't want to say any more than I had to, but afterwards things have changed, at least my [105] outlook on life has, and I feel that in order for me to make anything of myself I have to face up to what I have done and tell the police everything that I know so that I can more or less clear myself with my past.

Q. And did you, Mr. Payne, as a result of this changed outlook on life, reconsider the stories? Did you think about them? A. I am only telling the truth, sir. I haven't added anything to it or taken anything away.

Q. You are just telling more details than you told previously, is that correct? A. Yes, sir.

* * * * *

[110] Q. Now, Leroy, just to get this story straight, when you left—were you left alone at any time after your arrest until the time of your arraignment? A. I don't think so, sir.

Q. You don't think so? A. No, sir.

Q. Now, you had had no sleep the night before, naturally? A. That's right, sir.

Q. Do you recall when you first went to sleep? Was it after your arraignment? A. After.

Q. After you had been to court? A. It was after I had given a confession.

[111] Q. Now, just a few questions about this incident involving Mr. Lake. This took place at the Benton Harbor Police Station? A. Yes, sir.

Q. And it was prior to your arraignment? A. Yes, sir.

Q. Do you recall whether or not you asked to talk to him? A. Yes, sir, I did.

Q. You asked to talk to him? A. Yes, sir.

Q. What was your reason in making that request? A. I can't recall at the time.

Q. Well, if you can't recall, that's all right. But you did ask to talk to Mr. Lake. A. Yes, sir.

Q. And then he came into the room and you and he talked alone, is that correct? A. Yes, sir.

Q. Do you recall that converstion? As near as you can reconstruct it. A. No, sir, just parts; a little of it.

Q. Didn't he tell you that we had a good case against you? A. Yes, sir.

Q. And what was said about your wife? [12] A. Well, I hadn't said anything, I don't think, for a while, and Mr. Lake told me that they had a good case against me, and that if I tried to fight this case my wife would be prosecuted for perjury.

Q. You knew what perjury meant, didn't you? A. Yes.

Q. What did you think perjury meant? A. Lying.

* * * * *

RECROSS-EXAMINATION

By Mr. McQuillan:

Q. You say the day after you were picked up your pastor [113] came over to see you? A. About that time, yes.

* * * * *

Q. You asked for a Bible after you did this, too, didn't you? A. Yes, sir.

Q. It was just a little late, wasn't it? A. Yes, sir.
Q. You are an admitted burglar? A. Yes.
Q. And you are an admitted robber? A. Yes.
[114] Q. And an attempted murderer? A. Yes, sir.
Q. And an adulterer? A. Yes, sir.

* * * * *

REDIRECT EXAMINATION

By Mr. Lange:

Q. Mr. Payne, when you first told this story in court of the mistreatment by police officers, did you and I [115] discuss that matter in the presence of the court reporter? A. Yes, sir.

Q. And at that time did I explain to you that under the law you had a right to sign a complaint against any officer you desired? A. Yes, sir.

Q. And what did you tell me? A. I told you I had to think about it.

Q. And did I then tell you that any time you wanted to sign the complaint to let me know? A. Yes, sir.

Q. Have you ever let me know? A. No, sir.

* * * * *

[138] MR. MC QUILLAN: The motion is this: I respectfully move that the court strike all of Payne's testimony from the record, for the reason that his testimony is so patently unbelievable, in view of the circumstances surrounding his detention, and how they acquired this information, that I think as a matter of law it should be stricken from the record.

THE COURT: I will deny your motion without hearing an argument.

MR. MC QUILLAN: I can't argue it, in that case?

THE COURT: No.

* * * * *

[176] CHARLES PLUMMER

A witness called by and in behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. Lange:

Q. Will you state your full name, please? A. Charles Plummer.

Q. And where do you live, Mr. Plummer? A. Route 3, Coloma.

Q. And what is your regular occupation? A. Technical consultant with the Heath Company in St. Joe.

Q. And are you also a deputy sheriff of this county? A. Right.

Q. That would be one of the special deputies? A. Right.

* * * * *

[178] Q. Then what happened? A. At that point Det. Yost started to pull up beside the car, or up like you would begin to pass, and he sounded his siren and turn the car's spotlight on the car in front of us. I had a hand-held spotlight with a red lens that I flashed back and forth from my side of the car in the front seat. The car pulled over to the curb.

Q. After the car pulled over to the curb, what position was your squad car in with relation to the rear of this parked Pontiac? A. Directly behind it.

Q. What happened then, Mr. Plummer? A. I got out of the right side of the car. Det. Yost got out on the left side. We started to walk up towards this car, one on either side. I approached the car from the right side as

you are looking at it from the [179] rear, or the passenger side.

Q. Were you carrying anything as you approached this car at the right side? A. Yes, I had a five-cell flashlight with me.

Q. Did you have it turned on? A. Yes.

Q. And then what happened? A. As I approached the door of the car on the passenger's side I noticed a pile of things in the back seat of the car, and then just as I started to reach for the door it opened.

Q. Then what happened? A. I turned the light inside the car and bent my head down slightly, and this subject in the car fired a gun at me.

Q. There were two men in the car? A. Right.

Q. Which man fired the gun at you? A. The defendant, Bradford.

Q. And what side of the motor vehicle was he on? A. He was sitting in the passenger side of the Pontiac.

Q. And did this bullet strike you? A. In the right shoulder?

Q. What happened after the bullet struck you, Mr. Plummer? A. It spun me around. I stumbled or got myself to the rear [180] of the car, by the right rear fender, trying to get some cover to keep from being shot again. When I was laying on the ground I looked up, and the driver of the car came back and stood beside the left rear fender and pointed a gun at me and fired.

Q. As the driver of the automobile fired at you, what did you do, if anything? A. I had my own gun in my hand by that time. I raised it up in his face and pulled the trigger, and the first shell misfired.

Q. Didn't go off? A. That's right.

Q. Do you know who the driver of that automobile was? A. Yes.

Q. Who was that? A. Leroy Payne.

Q. Do you know who the passenger in that automobile was? A. Yes, it was the defendant?

Q. That is the defendant seated here in court? A. That's right.

Q. Do you know, Mr. Plummer, how many shots were fired by the defendant on that occasion? A. I know that the defendant fired one shot at me. I don't know how many more he fired.

[181] Q. If any? A. If any. I didn't count any more after the first one.

Q. And this bullet struck you in the shoulder? A. Yes, in the right shoulder.

Q. Can you estimate to the court and jury approximately how far you and the defendant were apart when this shot was fired? A. Approximately—our faces were approximately two feet apart, I imagine, as I stooped over to look in the car.

Q. Immediately after your gun misfired, what did you do? A. Well, as my gun misfired, his fired, and the shot hit me in the left side, and as soon as I could I pulled the trigger again. That time the gun fired.

Q. And what were you aiming at, if you remember? A. I was trying to aim at the driver of the car.

Q. Did you then radio the sheriff's office or any police agency for aid? A. Yes. As I fired the second time, or attempted to fire the second time, the driver stepped back into his car and started to drive away. While laying on the ground I fired four more shots at the car as it pulled away.

Q. You believe you may have struck that automobile as it was being driven away? A. I sure aimed at it. I believe I did.

[182] Q. Then did you call the police department for help? A. Well, the next thing that actually happened was the subject's car stopped some distance after it started up. I would say 50 or 60 feet. My gun was empty. I got up off the pavement and ran behind the patrol car, where I could see Det. Yost laying beside the left fender, and I started to reload. Before I could get my gun reloaded–I had put in two shells, and I watched the driver of the car walk back, or run back–hurry back toward us, and about half way back I knew I couldn.t get my gun loaded, and I hollored to Vic to hand me his gun and I would get him when he got back to the headlights.

Q. Then what happened? A. He turned, stopped and looked for a second. He was staring into our headlights. He turned and ran back to his car and started to drive away. By then I had finished reloading and I got into the patrol car.

Q. Did you follow him? A. I followed him about three blocks.

Q. And you subsequently lost him? A. Yes.

* * * * *

[184] Q. This was the early morning of the 5th of November of 1962? A. Right.

Q. And you had some surgical treatment that day? A. I believe it was about noon that day that they operated.

* * * * *

[186] Q. Now, Mr. Plummer, when were you discharged from the hospital? A. Well, the shooting was on the 5th, which was a Monday morning, and I was discharged the following Monday in the afternoon, after lunch.

Q. That would have been on the 12th? A. I believe so, if that's seven or eight days.

* * * * *

[188] CROSS-EXAMINATION

By Mr. McQuillan:

* * * * *

[192] Q. Now, did you see your assailant after that time? A. After the shooting?

Q. After the shot was fired, yes. A. Not after the shot was fired.

Q. You saw the other man, Payne? He came over and shot you, too? A. That's right. I saw him after that.

Q. Now, you were taken—do you have any idea as to what time you arrived at the hospital for treatment? A. Some time during—something like that is kind of hard to judge. I would say from the time I got back to Victor it was a minute or two before the ambulance arrived, because I barely had time to get out of the car and walk over to him and asked him how he was getting along. He couldn't get up, and I saw the ambulance light coming. I moved the car out of the road, over to the curb then, and I would say from that point, not over ten minutes that we were in the emergency room. We were about a block and a half from there.

Q. You stayed in the hospital just about a week? A. Seven or eight days. From early Monday morning until the middle of Monday noon following.

* * * * *

(DEFENSE CASE:) [240]

DEWEY HANES

A witness called by and on behalf of the defendant, being first duly sworn, was examined and testified on his oath as follows:

[241] DIRECT EXAMINATION

By Mr. McQuillan:

Q. Will you state your name, please? A. Dewey Hanes.

Q. And where do you live? A. Lansing, Michigan.

Q. By whom are you employed? A. The Lansing State Journal.

Q. And how long have you been employed at that place? A. About three months.

Q. Now, where were you working on or about November 4th, 5th, and 6th, 1962? A. In Benton Harbor.

Q. And by whom were you employed at that time? A. The News Palladium.

Q. In what capacity? A. Reporter.

Q. Now, do you recall the early morning hours of November the 5th, 1962? A. Yes.

* * * * *

[245] Q. Now, do you know Leroy Payne? A. I have seen him.

Q. And did you see him after this shooting incident? A. Yes.

MR. LANGE: I think it's time for the jury to be excused, your honor.

(Whereupon the jury leaves the courtroom.)

MR. LANGE: Well, if the court please, we will show you the photograph. I am sure the court has seen a blown-up copy of this in the press shortly after this incident happened. I don't believe that this particular photograph has any materiality to [246] any issue here. I agree with at least what I figure was the thinking of the court as to certain remarks made this morning outside the presence of the jury, that we have gone quite far afield regarding what happened to Leroy Payne. As to what effect this might have on his credibility as a witness I will abide by the ruling of the court, naturally, but I don't see

how this has any material issue here. This matter has been fully testified to by Leroy Payne in the greatest of detail without any objection by anyone, and I feel this is no different than the rule that you don't show—don't ordinarily show photographs of a dead or mutilated body to a jury because it tends to inflame them. That's the only basis for my objection.

THE COURT: We certainly have covered it, Mr. McQuillan, to the nth degree. The witness has admitted he was beaten up. He has told about being tortured. It goes a lot further than the picture does. There has been no denial of it in the people's case. It seems to me like this is overburdening the animal.

(Further colloquy between court and counsel reported, but not transcribed.)

THE COURT: Why don't you have the [247] witness testify to the picture, then and put the picture in.

MR. MC QUILLAN: Because I've got a right to have this jury hear every bit of evidence that has a bearing upon that witness' credibility.

THE COURT: Not every bit of it; not something that's cumulative to the nth degree.

MR. MC QUILLAN: I would like to then submit an offer of proof.

THE COURT: You may then submit an offer of proof.

Q. (By Mr. McQuillan, continuing) Mr. Hanes, you testified that you know Leroy Payne. A. I have seen him.

Q. You saw him after this shooting incident first arose? A. Yes.

Q. Where did you see him? A. Well, the only place I can remember having seen him was when he was arraigned in municipal court, but I think I saw him earlier in the jail, too.

Q. Do you remember what time that was when you saw him in municipal court? A. Yes, it was shortly before midnight.

Q. On Monday, November 5th? [248] A. Well, I don't remember the date.

Q. Now, I show you this photograph, which has been marked for identification as defendant's exhibit D, and I ask you if you can identify the individual shown on that photograph. A. That is Payne.

Q. And is that photograph—does that photograph present a full, true, and correct representation of Mr. Payne's appearance as you saw him in the municipal court that evening, as you testified to? A. Well, he looked a little better than that, but that's close enough.

Q. Does that show how he appeared that evening? A. Well, he was cleaned up, but his eye was puffed like that.

Q. Did you ever see him when he appeared as he does in this photograph? A. No, not exactly like that; reasonably substantially like that.

Q. Where was that? A. In the court when he appeared for arraignment.

Q. In Benton Harbor? A. Yes.

MR. MC QUILLAN: I renew my motion, your honor, that it be admitted in evidence.

THE COURT: I will deny it on the ground that it's highly inflamatory, and it's not necessary for the protection of the defendant or for proving anything in connection with the credibility of the witness Payne.

* * * * *

[293] Mr. MC QUILLAN: I would like to recall Leroy Payne.

LEROY PAYNE

A witness having been previously sworn, resumed the stand and testified further as follows:

RECROSS EXAMINATION

By Mr. McQuillan:

Q. Mr. Payne, you testified earlier that you pled guilty to the charge of assaulting Officer Yost with intent to murder. A. Yes, sir.

Q. Are there any other criminal charges pending against you at the moment? A. Yes, there is.

Q. What are they? A. Assault with intent to kill, and breaking and entering.

Q. Officer Plummer? A. Yes, sir.

Q. And is there a burglary charge pending? A. Yes.

Q. Has there ever been any charges brought against you in connection with all these burglaries that you admitted? [294] A. No.

Q. Have there ever been any criminal charges brought against you with respect to the two armed charges you admitted? A. No.

MR. MC QUILLAN: That's all.

MR. LANGE: I have no questions of this witness at this time.

(Witness excused.)

MR. MC QUILLAN: The defense rests, your honor.

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REPLY BRIEF OF APPELLANT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

OPINIONS BELOW

People v Payne, 386 Mich 84, 191 NW2d 375 (1971), and People v Payne, 18 Mich App 42, 170 NW2d 523 (1969).

JURISDICTION

Jurisdiction was invoked under 28 USC Sub-Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

That portion of the Fourteenth Amendment stated in the Appellant's Brief.

QUESTIONS PRESENTED

Petitioner reasserts the questions presented in Petitioner's Brief.

STATEMENT OF THE CASE

The Statement of Case for the purposes of this reply brief the Petitioner relies on the Statement of the Case in Petitioner's Brief.

ARGUMENT

I. Retroactivity of *North Carolina* v *Pearce*.

Respondent has devoted the largest portion of his Brief to the question of the retroactivity of *North Carolina* v *Pearce*, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969) and on page 20 of that brief cited the newly-delivered opinion of this Court *Robinson* v *Neil*, 12 Criminal Law Reporter 3071 (January 16, 1973) in support of his position. However a careful reading of *Robinson* reveals a rationale which quite strongly supports Petitioner's position of the non-retroactivity of that portion of *Pearce* which would affect this case.

In holding that *Waller* v *Florida*, 397 US 387 (1970) was to be accorded retrospective effect, Mr. Justice Rehnquist provided a brief analysis of the relationship between the various decisions of this Court on retroactivity. While the Court did not provide an exhaustive analysis of the concepts of retroactivity and prospectivity together with the criteria which determine the application of each, it did make some relevant comments concerning the cases of the Court beginning with *Linkletter* v *Walker*, 381 US 618 (1965), comparing them with certain other decisions, for example *Furman* v *Georgia*, 408 US 238 (1972) and *Waller* v *Florida*, 397 US 387 (1970). *Robinson* makes it clear that the question of retroactivity of a new Constitutional decision in the area of criminal law depends both on the right or privilege newly-defined and on the purpose for the rule of the case.

Petitioner contends that both the right defined and the rule promulgated by *Pearce* make it a case naturally suited for prospectivity-only application under the *Linkletter* line of cases. First of all, the right defined is that of "due process' and, more specifically, the excision from, a) the sentencing process of judicial vindictiveness against a defendant for his having won an appeal, and b) the reasonable fear by a convicted defendant of such vindictiveness from the appellate process. Secondly, the rule of the case in *Pearce* as it applies to a defendant reconvicted

and resentenced after a successful appeal is tailored to prospectivity, both in the language used in the *Pearce* decision setting forth the record-making "prophylactic rule", and by the very sense and purpose of the rule, that is deterrence of illegal judicial conduct and allaying the reasonable fears of defendants contemplating appeal.

As the Court noted in *Robinson, Desist* v *United States*, 394 US 244 (1969) examined the cases decided after *Linkletter* and "more fully enunciated the guiding criteria of those cases". *Robinson, supra*, page 3072. In evaluating the relative importance of the three *Linkletter* criteria it stated at pages 249-51:

> Foremost among these factors is the *purpose to be served* by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule [citing and discussing *Mapp* v *Ohio*]. . . .
>
> Although there apparently have not been many Federal convictions based on evidence gathered by warrantless electronic surveilance, we have no cause to doubt that the number of State convictions obtained in reliance on pre-*Katz* decisions is substantial. . . . It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity. Because the deterrent purpose of *Katz* overwhelmingly supports non-retroactivity, we would reach that result even if relatively few convictions would be set aside by its retroactive application. (Emphasis supplied.)

Pearce aimed at the deterrence of improper judicial conduct by the procedural tool of limiting the resentencing judge to certain objective factors to be placed on the record in imposing a higher sentence.

The citation in *Robinson* of *Pearce* clearly was directed towards its double jeopardy aspect, requiring that credit be given for time served on a voided conviction, since it

was coupled with citation of *Ashe* v *Swenson*, 397 US 436 (1970), in explanation of *Benton* v *Maryland*, 395 US 784 (1969).

Respondent in his brief has cited numerous authorities, and presented in his footnotes what purportedly is a survey of the application of *Pearce* by the Federal and State Courts. Furthermore in his brief he criticizes Petitioner for "misleading" this Court with regards the holdings in three cases, *United States* v *Gambert*, 433 F2d 321 (4th Circuit, 1970) and *Allen* v *Henderson*, 434 F2d 26 (5th Circuit, 1970) as well as *Commonwealth* v *Allen*, 443 PA 96, 277 Atlantic 2d 803 (1971). The Petitioner feels that the interpretation given in its brief is a reasonable one, as is clear from the context in which the cases are cited.

However Defendant has misconstrued or overextended far more than three cases. For example, on pages 11-13 in two footnotes, 3 and 4, it cites 21 cases in support of various propositions.

Under the heading "Pearce Held Retroactive And Applicable To Judge Resentencing" respondent cites 13 cases. Of those 13, 5 must be considered inaccurate.

State v *Pilcher*, 171 NW2d 251 (Iowa, 1969) decided that a sentence there imposed was to be modified pursuant to State statutory authority and the question of retroactivity of *Pearce* was expressly disregarded.

Hord v *Commonwealth*, 450 SW2d 530 (Kentucky, 1970), where a defendant, convicted of breaking and entering, sentenced to one year in prison but put on probation, was later found guilty of a probation violation and his sentence was changed to two years in prison. The Kentucky Supreme Court held that this was an *increase in an already imposed* sentence and not simply a proper punishment for violation of probation. This case has nothing to do with the retroactivity of *Pearce* to an increase in sentence following a *retrial* on the principal charge.

People v *Payne*, 386 Mich 84, 191 NW2d 375 (1971) expressly withheld ruling on the retroactivity of *Pearce* but applied it to *Payne* to instruct the lower courts in Michigan.

Miller v *State*, 471 SW2d 399 (Texas Court of Criminal Appeals, 1971) is properly entitled *Martinez* v *State*. It

involved defendant originally indicted with: Delivery of heroin with punishment enhanced by two prior convictions. In the midst of his first trial the State waived or abandoned the proof of the two prior offenses for the enhanced punishment. He was sentenced to 15 years under the primary offense. After defendant appealed and won a new trial the prior indictment was dismissed and a new indictment was brought containing the original charge. This time the state proved the two prior offenses and defendant was sentenced to life imprisonment. (This is analogous to the taking of a plea to a lesser included offense, followed by an appeal and a new trial; at such new trial the original charge may be reinstated and defendant convicted thereof.

Lastly *Denny* v *State*, 178 NW2d 625 (Wisconsin, 1970) discussed *Pearce*. However, the second sentencing there involved took place on September 25, 1969, according to information furnished Petitioner by the Wisconsin Attorney General's Office. Thus retroactivity could not have been presented to that Court.

Under the heading "Pearce Applied Retroactivity (sic) To Trial De Novo" there are additional inaccuracies.

State v *DeBonis*, 276 Atlantic 2d 137 (New Jersey, 1971) explicitly stated that *Pearce* was not needed to determine the result in that case, that it was a matter of public policy and one apart from constitutional compulsion. Furthermore, the de novo trial and sentencing occurred on January 20, 1970, thus eliminating the retroactivity issue.

Commonwealth v *Harper*, 280 Atlantic 2d 637 (Pennsylvania, 1971) involved a case in which the *original arrest* was made in *November* of *1969* according to information furnished petitioner by Joseph Murray, Assistant District Attorney for the State of Pennsylvania in Philadelphia. Thus there can be no question of a holding of retroactivity.

Cherry v *State*, 264 Atlantic 2d 887 (Maryland, 1970) involved a trial de novo, conviction and sentence which occurred on *July 14, 1969, after Pearce* was decided. Furthermore the Maryland Court of Appeals explicitly noted in its opinion that retroactivity was not involved.

Under the heading "Pearce Held Not Applicable To Judge Resentencing":

Chaffin v *State,* 180 SE2d 741 (Georgia, 1971) the court specifically found that a life sentence after retrial after a fifteen year first sentence was reversed was correct and intrepreted *Pearce* accordingly.

Under the heading on page 14, "Pearce Held Implicitly Retroactive And Applied To A Jury Sentencing": *Roberson* v *State,* 258 Southern 2d 257 (Florida, 1971) involved a crime which on the very face of the opinion is shown to have occurred *after Pearce* was decided. Thus there is no question of retroactivity.

Of the cases cited in footnote 11 of respondent's brief, *Culp* v *Bounds,* 325 F Supp 416 (DCWDNC, 1971); *Sefcheck* v *Brewer,* 301 F Supp 793 (DCSDIOWA, 1969) and *Zaffarano* v *Blackwell,* 307 F Supp 1109 (DCNDGA, 1969) are all cases dealing with credit being given for time already served, and not resentencing. Also *Griffin* v *Wilkerson,* 335 F Supp 1272 (DCWDVA, 1971) does not deal with retroactivity since all three convictions and sentences appealed from occurred in 1970. And *Walsh* v *Picard,* 328 F Supp 427 (DCMASS, 1971) dealt with appellate review of sentencing, the same case reviewed by the Massachusetts Court in *Walsh* v *Commonwealth,* 260 NE2d 911 (1970).

Lack of availability of Court records on short notice has made like research into other citations by Respondent difficult.

As to defendant's request to be afforded the protection of retroactive application should *Pearce* not be accorded retroactivity, Petitioner requests this Court to adopt June 23, 1969 as the cut-off date and hold that only *sentences imposed after* that date would be affected by the *Pearce* rule as was done in *Desist* v *United States, supra.*

AS TO PAYNE'S CONDUCT JUSTIFYING THE HIGHER SENTENCE

As to the question of whether or not Payne committed perjury at the second trial and whether or not that conduct would justify an increased sentence, it should be noted that the gist of his testimony at his trial was that of alibi.

Both the judge and the jury at the second trial considered the following evidence:

1. Identification of the defendant Leroy Payne made at the trial by Victor Yost as the person who shot him. (Trial Transcript, pp. 9-46).

2. Corroborative statements made by Vic Yost immediately after he was shot to the first officers on the scene, naming Leroy Payne as the person who shot him and giving the license number of the suspect's car (which was later identified as belonging to Leroy Payne). (Trial transcript pp. 60-62; 64-65; 74-75).

3. The fingerprint identification and ballistics identification that Leroy Payne's fingerprint was on the assault weapon. (Trial Transcript pp. 86-91; 93-101; 111-130; 138-157).

4. Leroy Payne's testimony that he was at home in bed when the shooting took place. (Trial Transcript pp. 185-208. When a defendant does not take the stand in his own defense or if, taking the stand, he simply states that he is "innocent" or "not guilty" or words to that effect, he is not making the affirmative *factual* statements that he does when he establishes an alibi for himself. He is merely stating his belief as to his position before the law. But where a defendant so establishes an alibi as to metaphysically exclude his presence at a scene of the crime, a verdict of guilt beyond a reasonable doubt *necessarily implies* that the trier of fact believes beyond a reasonable doubt that the defendant has not told the truth. Such is the case here. And this is independent of defendant's prior plea of guilty or his testimony at the Bradford trial. It is, in short, objective, detrimental conduct which occurred after the first sentencing.

Finally, it should be noted that nowhere until the filing of respondent's brief on the merits (and there by process of elimination) has it ever been alleged that Judge Byrns imposed the higher sentence out of vindictiveness for Payne's appealing. No one, not Philip Brown, Payne's attorney through his first conviction, who obtained his new

trial, who sought and received a change of venue from Judge Byrns, who tried the case, who pleaded Payne's case at the allocatur before sentencing and who finally obtained for Payne a favorable decision of the Michigan Supreme Court reducing his sentence, ever allege Judge Byrns to have acted vindictively in imposing the sentence. Nor even did Leroy Payne in his *pro per* answer to Petitioner's Application in this Court specifically allege vindictiveness on the part of Judge Byrns. Nor could they have since a careful review of the record indicates precisely the contrary.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MICHIGAN *v.* PAYNE

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 71–1005. Argued February 22, 1973—Decided May 21, 1973

The "prophylactic" due process limitations established by *North Carolina* v. *Pearce*, 395 U. S. 711, 723–726, to guard against the possibility of vindictiveness in cases where a judge imposes a more severe sentence upon a defendant after a new trial, are not retroactively applicable to resentencing proceedings that, like the one involved in this case, occurred prior to the date of the *Pearce* decision. Pp. 4–11.

386 Mich. 84, 191 N. W. 2d 375, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion, in Part III of which STEWART, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1005

State of Michigan, Petitioner, *v.* Leroy Payne. | On Writ of Certiorari to the Supreme Court of Michigan.

[May 21, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

A writ of certiorari was granted in this case, 409 U. S. 911 (1972), to decide whether the due process holding of *North Carolina* v. *Pearce*, 395 U. S. 711, 723–726 (1969), is to be given retroactive effect. For the reasons that follow, we hold today that this decision is nonretroactive.

I

Respondent, Leroy Payne, pleaded guilty in a county circuit court in Michigan to a charge of assault with intent to commit murder in connection with an armed attack upon two sheriff's deputies. In March 1963, he was sentenced to a prison term of from 19 to 40 years. Several years later, respondent's conviction and sentence were set aside when a hearing, ordered by the Michigan Court of Appeals, disclosed that his confession and subsequent guilty plea were involuntary. Following a retrial, at which he exercised his rights to trial by jury and to plead innocent, respondent again was found guilty on the same assault charge. On the 30th of August 1967, he was resentenced to prison from 25 to 50 years with full credit for all time served under the prior sentence. Dur-

ing the resentencing hearing, the judge explained that the higher sentence was "based on the nature of the crime and on the impressions which I formed of [respondent] and of the crime."

Respondent appealed to the Michigan Court of Appeals, which affirmed his conviction and approved the higher sentence. 170 N. W. 2d 523, 18 Mich. App. 42 (1969). While the case was pending before the Michigan Supreme Court, the trial judge who had presided over respondent's second trial was requested to submit an affidavit detailing his reasons for imposing a higher sentence. The judge's affidavit stated that his sentencing determination was based primarily on (i) his personal belief that respondent's attitude since the first sentencing proceeding had changed from one of regret to remorselessness, (ii) his view that respondent's alibi defense, given under oath, was a "tissue of lies," and (iii) his heightened opportunity to learn of the details of the crime during the three-day trial.[1]

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[1] In his affidavit, the second sentencing judge indicated that a different judge who presided over respondent's prior guilty plea and sentencing hearings did not have as good an opportunity to become fully informed of the details of the "deliberate, cold-blooded attack." In a subsequent amendatory affidavit filed by the same judge, he corrected his prior affidavit by stating that the first judge did have "some limited opportunity to see and hear [respondent] when he testified as a witness for the prosecution against his accomplice" in a separate trial. The parties in this case now agree that the first judge did preside over the trial of respondent's codefendant before sentencing respondent and that respondent did testify at that trial. The parties continue, however, to dispute whether that opportunity was as complete as the opportunity afforded the second judge, and, if not, whether this is a permissible consideration in resentencing under *Pearce*. Because of the manner in which we dispose of this case, we need not resolve this controversy. See n. 3, *infra*.

The Michigan Supreme Court, in a 4-to-3 decision, upheld the conviction but rejected the higher sentence as violative of the due process restrictions established in *North Carolina* v. *Pearce, supra.* 191 N. W. 2d 375, 386 Mich. 84 (1971). The court recognized that this Court had not yet decided whether *Pearce* applied to resentencing proceedings which, as in this case, occurred prior to *Pearce*'s date of decision.[2] While declining to predict how the retroactivity question would ultimately be resolved, the Michigan Supreme Court decided to apply *Pearce* to the case then before it "pending clarification" by this Court. *Id.*, at 378 n. 2, 386 Mich., at 90 n. 3. Before this Court, the State contends that *Pearce* should not be applied retrospectively, but that, even if applicable, the state supreme court erred in holding the higher sentence invalid under the *Pearce* test. Because we hold today that *Pearce* does not apply retroactively, we do not reach the State's second contention.[3]

[2] This Court has twice previously granted certiorari to resolve this question, but on each occasion the writ was dismissed as improvidently granted. *Moon* v. *Maryland*, 398 U. S. 319 (1970) (cert. granted, 395 U. S. 975 (1969)); *Odom* v. *United States*, 400 U. S. 23 (1970) (cert. granted, 399 U. S. 904 (1970)).

[3] This Court has consistently declined to reach out to resolve unsettled questions regarding the scope or meaning of decisions establishing "new" constitutional requirements in cases in which it holds any such decisions nonretroactive. See *Stovall* v. *Denno*, 388 U. S. 293 (1967) (holding *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), nonretroactive without resolving the question whether those cases were applicable to preformal accusation confrontations, a question later decided in *Kirby* v. *Illinois*, 406 U. S. 682 (1972)); *DeStefano* v. *Woods*, 392 U. S. 631 (1968) (holding *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), nonretroactive and declining to decide whether a summary contempt proceeding that results in a one-year sentence is a "serious" offense requiring trial by jury, a question later decided in *Baldwin* v. *New York*, 399 U. S.

II

In *Pearce,* the Court emphasized that "[i]t can hardly be doubted" that, while "there exists no absolute constitutional bar to the imposition of a more severe sentence upon retrial," it would be entirely impermissible for judges to render harsher penalties as punishment for those defendants who have succeeded in getting their convictions reversed. 395 U. S., at 723–724. "[V]indictiveness" against a defendant for having exercised his rights to appeal or to attack his conviction collaterally, the Court held, "must play no part in the sentence [a defendant] receives after a new trial." *Id.,* at 725. In so holding, the Court recognized that "fundamental notions of fairness embodied within the concept of due process" absolutely preclude the imposition of sentences based upon such a " 'retaliatory motivation.' " *Chaffin* v. *Stynchcombe, ante,* at 8. No "new" constitutional rule was thereby established and it cannot be questioned that this basic due process protection articulated in *Pearce* is available equally to defendants resentenced before and after the date of decision in that case. On this point the parties do not disagree.

The dispute in this case centers instead around the "prophylactic" [4] limitations *Pearce* established to guard

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66 (1970)); *Carcerano* v. *Gladden,* 392 U. S. 631 (1968) (a companion case with *DeStefano* in which the Court declined to decide whether the right to jury trial contemplated by *Duncan* also required a unanimous verdict, a question later decided in *Apodaca* v. *Oregon,* 406 U. S. 404 (1972)); *Elkanich* v. *United States,* 401 U. S. 646 (1971) (a companion case with *Williams* v. *United States,* 401 U. S. 646 (1971), holding *Chimel* v. *California,* 395 U. S. 752 (1969), nonretroactive and declining to decide whether the search was otherwise compatible with the *Chimel* limitations on searches incident to lawful arrests).

[4] *Chaffin* v. *Stynchcombe, ante,* at 8; *Colton* v. *Kentucky,* 407 U. S. 104, 116, 118 (1972).

against the possibility of vindictiveness in the resentencing process. Those limitations, applicable "whenever a judge imposes a more severe sentence upon a defendant after a new trial," 395 U. S., at 726, require that the sentencing judge's reasons "must affirmatively appear," and that those reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Ibid.* The question here is whether these restrictions govern resentencing proceedings predating *Pearce.*

The contours of the retroactivity inquiry have been clearly delineated in numerous decisions over the last decade. The test utilized repeatedly by this Court to ascertain whether "new" constitutional protections in the area of criminal procedure are to be applied retroactively calls for the consideration of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967). See also *Linkletter* v. *Walker,* 381 U. S. 618, 629, 636 (1965); *Tehan* v. *Shott,* 382 U. S. 406, 410–418 (1966); *Johnson* v. *New Jersey,* 384 U. S. 719, 726–727 (1966).

The two purposes for the resentencing restrictions imposed by *Pearce* were to ensure (i) "that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence he receives after a new trial . . ." and (ii) that apprehension of such vindicativeness would not "deter a defendant's exercise of the right to appeal or collaterally attack his first conviction. . . ." 395 U. S., at 725; *Colten* v. *Kentucky,* 407 U. S. 104, 116 (1972). The latter purpose is not pertinent to this case, since respondent was not deterred from exercising his right to challenge his

first conviction. But, in any event, we think it clear that this function of the new resentencing rules could be served only *in futuro:* nothing in *Pearce* suggests that the Court contemplated that its decision might provide a ground for the untimely reopening of appeals by defendants who decided not to appeal prior to the date of decision in *Pearce.*[5] See *James* v. *Copinger,* 441 F. 2d 23 (CA4 1971).

The first articulated purpose of the *Pearce* rules—to protect against the possibility that actual vindictiveness will infect a resentencing proceeding—deserves closer scrutiny. Unlike the purposes underlying many of the decisions heretofore accorded retrospective application,[6] this purpose does not implicate the " 'fair determination' of . . . *guilt or innocence.*" *Roberts* v. *Russell,* 392 U. S. 293, 294 (1968) (emphasis supplied). It does, however, involve questions touching on the "integrity" of one aspect of the judicial process. *McConnell* v. *Rhay,* 393 U. S. 2, 3 (1968). The *Pearce* restrictions serve to ensure that resentencing decisions will not be based on improper considerations, such as a judge's unarticulated resentment at having been reversed on appeal, or his subjective institutional interest in discouraging meritless appeals. By eliminating the possibility that these factors might occasion enhanced sentences, the *Pearce* prophylactic

[5] This is not to suggest, of course, that there may not be specific cases in which a convicted defendant might show that his initial waiver of his right to appeal was involuntary because caused by a reasonably based fear of actual vindictiveness on the part of a particular judge. Cf. *North Carolina* v. *Pearce,* 395 U. S., at 725 n. 20.

[6] See, *e. g., In re Winship,* 397 U. S. 358 (1970) (held retroactive in *Ivan* v. *New York,* 407 U. S. 203 (1972)); *Barber* v. *Page,* 390 U. S. 719 (1968) (held retroactive in *Berger* v. *California,* 393 U. S. 314 (1969)); *Bruton* v. *United States,* 391 U. S. 123 (1968) (held retroactive in *Roberts* v. *Russell,* 392 U. S. 293 (1968)); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

rules assist in guaranteeing the propriety of the sentencing phase of the criminal process. In this protective role, *Pearce* is analogous to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in which the Court established rules to govern police practices during custodial interrogations in order to safeguard the rights of the accused and to assure the reliability of statements made during those interrogations. Thus, the prophylactic rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process. Because of this similarity, we find that *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), which held *Miranda* nonretroactive, provides considerable guidance here. See also *Jenkins* v. *Delaware*, 395 U. S. 213 (1969).

It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce*, that their retrospective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation. *Miranda's* well-known warning requirements provided a protection "against the possibility of unreliable statements in *every* instance of in-custody interrogation," and thereby covered many "situations in which the danger [was] not necessarily as great as when the accused is subjected to overt and obvious coercion." *Johnson* v. *New Jersey*, 384 U. S., at 730 (emphasis supplied). Thus, had *Miranda* been applied retroactively, it would have required the reversal of many convictions in which no serious constitutional violation had occurred. *Id.*, at 731. Likewise, the retroactive application of *Pearce* would require the repudiation of many sentences rendered under circumstances in which there was no genuine possibility that vindictiveness played a role. Judicial impropriety in the resentencing process, albeit intolerable wherever it happens, surely is not a common practice. Indeed, nothing in *Pearce* in-

timates that the Court regarded it as anything more than an infrequently appearing blemish on the sentencing process.[7] Absent countervailing considerations rooted in the purposes underlying a new rule, this factor—that retroactive application of such broadly protective rules would occasion reversals in many instances in which no actual prejudice has been suffered—points toward a ruling of prospectivity.

Nonretroactivity is also suggested by the second similarity between *Miranda* and *Pearce*. While each created a protective umbrella serving to enhance a constitutional guarantee, neither conferred a constitutional right that had not existed prior to those decisions. The right against use of an involuntary confession long preceded *Miranda* just as the right to be free from fundamentally unfair sentencing considerations predated *Pearce*. *Ante*, at 4. Because these foundational rights remain available to defendants in pre-*Miranda* and pre-*Pearce* cases, a decision of nonretroactivity is less likely to result in the continued incarceration of those whose convictions or sentences rest on unconstitutional acts.[8] *Linkletter* v. *Walker*, 381 U. S., at 640 (Mr. Justice Black, dissenting).

Of course, the question of the impact of particular decisions on the reliability and fairness of any aspect of a criminal proceeding is inherently a matter of balancing "probabilities." *Johnson* v. *New Jersey*, 384 U. S., at 729; *Adams* v. *Illinois*, 404 U. S. 278, 281 (1972). Yet

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[7] The most that may be said is that the Court in *Pearce* found that "increased sentences on reconviction are far from rare," 395 U. S., at 725 n. 20, and that it was persuaded that vindictiveness played a role in a sufficient number of those cases to "warrant the imposition of a prophylactic rule." *Colton* v. *Kentucky*, 407 U. S., at 116.

[8] See *Johnson* v. *New Jersey*, 384 U. S., at 730. See also *Stovall* v. *Denno*, 388 U. S., at 299 (in pre-*Wade-Gilbert* cases "it remains open to all persons to allege and prove [that] the confrontation . . . infringed his right to due process of law"); cf. *Halliday* v. *United States*, 394 U. S. 831, 833 (1969).

in view of the fact that, if retroactive, *Pearce* would apply to innumerable cases in which no hint of vindictiveness appears, coupled with the consideration that due process claims may always be made in those prior cases in which some evidence of retaliatory motivation exists,[9] we have little doubt that that the "probabilities" in this case preponderate in favor of a ruling of nonretroactivity.[10]

Although the remaining factors—reliance and burden on the administration of justice—have been regarded as having controlling significance "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity," *Desist* v. *United States*, 394 U. S. 244, 251 (1969), those considerations also support the nonretroactivity of *Pearce*. The result in *Pearce* was not "foreshadowed" by any prior decision of this Court.[11] Indeed, prior to *Pearce*, resentencing judges were bound by no requirement that they articulate their reasons and generally enjoyed a wide discretion in terms of the factors they might legitimately consider. See *Williams* v. *New York*, 337 U. S. 241 (1949). Nor could it be said that the Court's decision was clearly forecasted by any trend of lower court decisions. In *Pearce* itself the Court noted

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[9] Of course, it remains true that "retaliatory motivation" may be "difficult to prove in any individual case." *North Carolina* v. *Pearce*, 395 U. S., at 725 n. 20. And, this is certainly one of the reasons why the Court in *Pearce* adopted a prophylactic rule. Similar problems of proof prompted the decisions in *Miranda* and *Wade*, but such problems in themselves were not sufficient to warrant retrospective application.

[10] We reiterate here what the Court has repeatedly said in retroactivity cases: "We do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." *Johnson* v. *New Jersey*, 384 U. S., at 728; *Linkletter* v. *Walker*, 381 U. S. 618, 629 (1965).

[11] Compare *Berger* v. *California*, 393 U. S. 314 (1969), and *Roberts* v. *Russell*, 392 U. S. 293 (1968), with *Adams* v. *Illinois*, 405 U. S. 278 (1972), and *Johnson* v. *New Jersey*, 384 U. S., at 731.

that lower federal and state courts were divided on all of the questions posed. 395 U. S., at 715 n. 5. Under these circumstances, judicial reliance on prior law was certainly justifiable.[12]

Because of that reliance, it is fair to assume that in prior years few, if any, judges complied during resentencing with *Pearce*'s recordation requirement, and that they often considered a variety of factors relating to the defendant and his crime which might or might not have fallen within the *Pearce* standard. We have been presented with no statistical indications as to how many persons received increased penalties after retrials.[13] We cannot say, however, that the potential interference with the administration of justice would be insubstantial if *Pearce* were applied retroactively. In order to comply with *Pearce,* a resentencing judge—assuming he is still on the bench or otherwise available—would be required to make a factual determination as to the reasons for sentences he may have meted out years in the past. Compliance with that requirement would present considerable difficulties, since judges, like witnesses in criminal trials, lack infallible memories and perfect records of

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[12] We need not disagree with MR. JUSTICE MARSHALL'S notation, *post,* at 8 n. 9, that the *result* in *Pearce* was foreshadowed, *i. e.,* that higher sentences on retrial were being questioned. Our focus here, however, is on the prophylactic measure adopted to achieve that result. As to this, we do not think there is any serious question that neither the recordation requirement nor the limitations on matters to be considered were so clearly forecasted as to render a contrary state reliance unjustifiable.

[13] See Note, Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained under Traditional Waiver Theory, 1965 Duke L. J. 395, 399 n. 25 (informal survey of North Carolina courts showed that six of 50 reconvicted defendants received higher sentences).

their motivations.[14] *Linkletter* v. *Walker*, 381 U. S., at 637. While we would not shy from imposing these burdens were we persuaded that it is necessary to do so in order to effectuate the purposes underlying *Pearce*, we have found no such need here. In sum, upon application of the three-part test, we hold that the *Pearce* requirements are not to be accorded retroactive application.[15]

III

Since the resentencing hearing in this case took place approximately two years before *Pearce* was decided, we hold that the Michigan Supreme Court erred in applying its proscriptions here. Accordingly, the judgment of that court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[14] Thus, the retroactivity of *Pearce* would present difficulties not encountered in two of the Court's recent decisions holding retroactive cases involving resentencing: *Furman* v. *Georgia*, 408 U. S. 238 (1972) (the "death penalty" case); *Robinson* v. *Neil*, 410 U. S. — (1973) (holding *Waller* v. *Florida*, 397 U. S. 387 (1970) retroactive). In both cases, "[t]hat which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire factfinding process anew." *Robinson* v. *Neil*, 410 U. S., at —.

[15] Respondent, relying on *Linkletter* v. *Walker*, *supra*, and *Tehan* v. *Shott*, *supra*, urges the Court to distinguish between cases, like his, on direct appeal and those arising after a conviction and sentence have become final. We think the above-stated reasons for applying *Pearce* prospectively apply with equal force to all cases in which resentencing proceedings occurred before June 23, 1969, the date of decision in *Pearce*. See *Stovall* v. *Denno*, 384 U. S., at 300; *Desist* v. *United States*, 394 U. S., at 252; *Williams* v. *United States*, 401 U. S., at 651–652.

SUPREME COURT OF THE UNITED STATES

No. 71–1005

State of Michigan, Petitioner, *v.* Leroy Payne.	On Writ of Certiorari to the Supreme Court of Michigan.

[May 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

We deal here with the guarantee contained in the Fifth Amendment, applicable to the States by reason of the Fourteenth, *Benton* v. *Maryland*, 395 U. S. 784, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The construction given that clause was applied retroactively in *North Carolina* v. *Pearce*, 395 U. S. 711; and I think that *Payne* as well as *Pearce* should have the benefit of the "new" constitutional rule. My views have been at odds with those of the Court as witnessed by the dissent of Mr. Justice Black in *Linkletter* v. *Walker*, 381 U. S. 618, 640, which I joined and by my separate dissent in *Desist* v. *United States*, 394 U. S. 244, 255. I could understand making a "new" constitutional rule applicable only prospectively. But I cannot bring myself to making the "new" rule applicable to some but not to others. If a State has violated the Federal Constitution in convicting or sentencing a prisoner, I see no way of denying him relief from that unconstitutional trial or unconstitutional sentence.

The Double Jeopardy Clause in my view was designed to discourage the abusive use by the Executive and Judicial Branches of the awesome power of government over the individual. Jeopardy attaches once the trial starts. If there is error in that trial and as a result a new trial

is had, the Government cannot impose an added or increased sentence on the second trial. That is my view, as explained in *North Carolina* v. *Pearce, supra,* pp. 726–737. Respondent received a sentence of 19 to 40 years on his first trial and a greater one of 25 to 50 years on his second trial. I therefore would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 71–1005

State of Michigan, Petitioner, v. Leroy Payne. | On Writ of Certiorari to the Supreme Court of Michigan.

[May 21, 1973]

MR. JUSTICE MARSHALL, dissenting.

The Court today holds that no limitations need be placed on resentencings that occurred before the date of decision in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). I believe however, that the State has an obligation to present to the court reviewing the second conviction evidence from which that court can determine whether a new sentence, more severe than that imposed at a prior trial, resulted in part from the sentencing authority's desire to punish the defendant for successfully appealing his first conviction.[1] I therefore respectfully dissent.

I

This case raises the issue of retroactivity only because of the almost unbelievable sluggishness of the appellate process in Michigan. Payne's second sentence was imposed on August 30, 1967, nearly two years before *Pearce* was decided. However, the Michigan Court of Appeals

[1] The State did present an affidavit from the sentencing judge in this case. The Michigan Supreme Court held that it did not satisfy the requirement of *North Carolina* v. *Pearce*, 395 U. S. 711, 726 (1969), that more severe sentences can be justified only by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." See *People* v. *Payne*, 386 Mich. 84, —, 191 N. W. 2d 375, — (1971). Petitioner contends that this holding was erroneous. Petition for Writ of Certiorari, at 5–6. The Court does not address this contention, nor shall I.

did not decide Payne's appeal until July 28, 1969, one month after the decision in *Pearce*. The Michigan Supreme Court considered the case for two more years, finally deciding it on November 9, 1971. Had the appellate process in Michigan been at all expeditious, this Court might have used Payne's case as the vehicle to decide that harsher sentences on reconviction could be justified only by objective evidence of post-sentencing conduct by the defendant, the rule adopted in *Pearce*. The only difference between Pearce's case and Payne's, then, is that the former moved up to this Court more quickly than the latter. Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment.[2] And a difference in the speed with which a judicial system disposes of an appeal is not related in any way to the purposes served by the limitations that *Pearce* placed on resentencing. Thus, considerations of fairness rooted in the Constitution lead me to conclude that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule.

The rule adopted by the Court today is curious in another way. The Court appears to say that a defendant who failed to appeal his first conviction out of "a reasonably based fear of actual vindictiveness," *ante*, n. 6, is entitled to review of his conviction. Cf. *Fay* v. *Noia*, 372 U. S. 391, 396–397 n. 3 (1963).[3] If his appeal is

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[2] Since Payne's appeal was pending when *Pearce* was decided, I need not consider whether different considerations, such as the defendant's failure to raise the issue in seeking review from this Court or to persuade us on the merits, might suffice under the Due Process Clause to justify different treatment of defendants whose sentences had become final.

[3] Mr. Justice Harlan, dissenting in *Fay* v. *Noia*, 372 U. S. 391, 475 (1936), suggested that the possibility of an enhanced sentence after

successful, his new trial will occur after the date of decision in *Pearce*. Thus, any new sentence will be subject to the limitations imposed by *Pearce*. The rather strange result is that someone like Payne, who adhered to state procedural rules for vindicating his right to an error-free trial, may receive an enhanced sentence without limitation, while someone who did not adhere to those rules may not have his sentence increased unless the requirements of *Pearce* are met. I suppose that anomalies are occasionally inevitable, but I submit that we should consider very carefully any rule of retroactivity that has the effect of penalizing *compliance* with state procedural rules.

II

The Court applies the now-familiar three-pronged test to determine whether *Pearce* should be given retroactive effect, and it reaches the now-familiar result of nonretroactivity.[4] I believe that principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity. Inspecting the cases dealing with retroactivity, I find that they appear to fall into three groups. In some cases, this Court has held that the trial court lacked jurisdiction in the traditional sense. See, *e. g.*, *Benton* v. *Maryland*, 395 U. S. 784 (1969); *Waller* v. *Florida*, 397 U. S. 387 (1970). Those holdings have been made fully retroactive. *Ashe* v. *Swenson*, 397 U. S. 436

a successful appeal, according to the Court, precluded the State from relying on a failure to appeal as an adequate state ground supporting the denial of relief under federal habeas corpus. On his interpretation, then, *Fay* anticipated the holding in *Pearce*.

[4] In holding various rulings retroactive, this Court has given only the most cursory nod to the three-pronged test. See, *e. g.*, *Roberts* v. *Russell*, 392 U. S. 293 (1968); *McConnell* v. *Rhay*, 393 U. S. 2 (1968); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968).

(1970); *Robinson* v. *Neil*, 409 U. S. — (1973). Cf. *United States* v. *U. S. Coin & Curency*, 401 U. S. 715 (1971). In other cases the Court announced a rule that was central to the process of determining guilt or innocence, and whose application might well have led to the acquittal of the defendant. See, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *In re Winship*, 397 U. S. 358 (1970). Those holdings too have been given retroactive effect. *Pickelsimer* v. *Wainwright*, 375 U. S. 2 (1963); *Ivan* v. *New York*, 407 U. S. 203 (1972). Cf. *Adams* v. *Illinois*, 405 U. S. 278 (1972). All other constitutional rules of criminal procedure have been given prospective effect only.[5]

I confess that I have been unable to discover a principled basis for that threefold classification, but it does appear to be the factor operating in our cases. And I see little point in forcing lower courts to flounder without substantial guidance in the morass of our cases, by informing them that they are to apply a balancing test, when in fact it invariably occurs that the balancing test results in holdings of nonretroactivity. Furthermore, it demeans this Court to pretend to consider a variety of factors if, no matter how those factors are arrayed, the result is predetermined. An open-minded examination of this Court's cases on retroactivity compels the conclusion that the Court divides cases into several classes, and it is the classification, not the three-pronged test, that determines the result. Our time would be better

[5] *Linkletter* v. *Walker*, 381 U. S. 618 (1965), giving a limited retroactive effect to *Mapp* v. *Ohio*, 367 U. S. 643 (1961), is an anomaly at odds with the Court's subsequent treatment of problems of retroactivity and can be explained only by the Court's unfamiliarity with those problems when the case was decided. See also *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

spent, I think, in attempting to delineate the basis for those classifications, and to derive them from some constitutional principles, rather than in "applying" a balancing test. Indeed, it might have been thought that *Robinson* v. *Neil, supra,* had begun the task of rationalizing our cases, but apparently that is not so.

III

The holding of *Pearce* is a simple one: the Due Process Clause requires States to adopt procedures designed to minimize the possibility that a new sentence after a successful appeal will be based in part on vindictiveness for the defendant's having taken the appeal. The Court agrees that "this basic due process protection . . . is available equally to defendants resentenced before and after the date of decision in that case." *Ante,* p. 4. The question then is what procedures are required to insure that that protection has been afforded defendants resentenced before *Pearce* was decided. This question, like many of those involving retroactivity, relates to the integrity of the judicial process, not to the limitations placed by the Constitution on police behavior. One can agree that the precise requirements of *Pearce* are inappropriate for retrospective application, largely because they are procedurally ill-adapted to the problem, yet disagree with the Court that the States need do nothing all all to convince a reviewing court that vindictiveness played no part in the resentencing. See, *e. g., Commonwealth* v. *Allen,* 443 Pa. 96, 102, 277 A. 2d 803 (1971).

The issue need not be framed as the "retroactivity" of *Pearce.* The problem, as I see it, is to devise procedures that will permit reviewing courts to determine whether the requirements of the Due Process Clause have been met. In *Pearce* we concluded that it would be enough

for a judge, on resentencing a defendant, to state his reasons for imposing a more severe sentence. If the more severe sentence was based upon objective information, placed on the record, concerning the conduct of the defendant after the first sentencing, the more severe sentence was permissible. Such a rule, although not absolutely guaranteeing that vindictiveness will play no part,[6] nonetheless substantially reduces the possibility that it will, without significantly interfering with the judge's lawful discretion.

A rather similar procedure would accomplish the same result for defendants resentenced before *Pearce* was decided. If a defendant did receive a harsher sentence after a successful appeal, and he seeks to have it reduced to the original sentence, the State should be required to present evidence that the new sentence was based on post-sentence conduct. In the absence of such evidence, the sentence must be reduced.[7] The Court suggests that such a procedure would "occasion windfall benefits for some defendants who have suffered no constitutional deprivation." *Ante*, p. 7. That assertion must be considered more closely.

As the Court notes, there is little evidence that more severe sentences are often imposed. It cites an informal survey suggesting that 12% of reconvicted defendants

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[6] For example, the sentencing judge, had he considered the case as an initial matter, might have imposed a sentence shorter than that imposed at the first trial, but, out of vindictiveness, he might decide to reimpose the original sentence. The procedures outlined in *Pearce* cannot prevent this.

[7] I assume that the Court's reliance on the continuing availability of the "foundational" right means that an offender who shows that vindictiveness played a part in his resentencing is entitled to relief. I would simply shift the burden of proof to the State, which has better access to the relevant facts.

receive higher sentences. *Ante*, n. 13. Even if that estimate is only half as large as the actual figure for pre-*Pearce* cases, still there are clearly very few defendants who have received harsher sentences. With respect to many of them, it will not be difficult to produce evidence supporting the new sentence. As in *Moon* v. *Maryland*, 398 U. S. 319 (1970), and *Odom* v. *United States*, 400 U. S. 23 (1970), the sentencing judge might indicate by affidavit or order the grounds for his sentencing decision. If memories have faded, the State might show that a presentence report considered by the judge recited post-sentence conduct by the defendant that would justify the harsher sentence.

Thus, I do not think that it can fairly be said that the requirements I would impose would in fact result in windfall benefits to "innumerable" defendants, *ante*, p. 9; they would accrue to those few defendants who were convicted, successfully appealed, were reconvicted, and received harsher sentences so long ago that the State cannot produce evidence from which a reviewing court could find that vindictiveness played not part in the sentencing decision.[8] And the "windfall benefits" would impair no substantial state interest in incarcerating those few offenders. Unlike the suppression of probative evidence that might severely limit the State's ability to secure a conviction of a person who undoubtedly committed an offense, here the remedy is simply the re-

[8] State courts, closer to the problems of administering the rule I suggest, have widely thought that those burdens are not substantial. See, *e. g.*, *Stonom* v. *Wainwright*, 235 So. 2d 545 (Fla. 1970); *People* v. *Baze*, 43 Ill. 2d 298, 253 N. E. 2d 392 (1969); *State* v. *Pilcher*, 171 N. W. 2d 251 (Iowa 1969); *Hord* v. *Commonwealth*, 450 S. W. 2d 530 (Ky. 1970); *State* v. *Rentschler*, 444 S. W. 2d 453 (Mo. 1969); *Commonwealth* v. *Allen*, 443 Pa. 96, 277 A. 2d 803 (1971); *Denny* v. *State*, 47 Wis. 2d 541, 178 N. W. 2d 38 (1970).

duction of sentence. *North Carolina* v. *Rice*, 404 U. S. 244, 247 (1971). The sentence to be served would be one that had already been found appropriate by one judge, and would therefore satisfy the various interests advanced by incarceration.[9]

For these reasons, I dissent.

MR. JUSTICE STEWART joins Part III of this opinion.

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[9] The Court's conclusion that *Pearce* was not foreshadowed by decisions in this Court or by a trend of lower court decisions is somewhat misleading. This Court's decision in *Green* v. *United States*, 355 U. S. 184 (1957), raised substantial questions under the Double Jeopardy Clause of the constitutionality of enhanced sentences after a successful appeal. Also, one reading of *Fay* v. *Noia*, 372 U. S. 391 (1963), suggested by the dissent of Mr. Justice Harlan, is that a State may not burden the right to appeal with the possibility of an enhanced sentence. And prior to *Pearce*, the First, Second, Fourth, Fifth, and Seventh Circuit had held that enhanced sentences after reconviction could be justified only in limited circumstances. See *Marano* v. *United States*, 374 F. 2d 583 (CA1 1967); *United States* v. *Coke*, 404 F. 2d 836 (CA2 1968) (*en banc*); *Patton* v. *North Carolina*, 381 F. 2d 636 (CA4 1967); *Rice* v. *Simpson*, 396 F. 2d 499 (CA5 1968); *United States* v. *White*, 382 F. 2d 445 (CA7 1967). So had the California Supreme Court, in a powerful opinion by Justice Traynor. *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963). Finally, a "learned and effective article," as Judge Friendly called it in *United States* v. *Coke*, *supra*, arguing the same point, appeared in 1965. Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965). I would think that these decisions and commentary had prepared the ground rather well for *Pearce*, as the Court concedes, *ante*, n. 12. Yet if the result was foreshadowed, it is not unreasonable to require States *now* to supplement the record, so that it will be clear that unconstitutional sentences were not imposed. Because it insists on treating the issue here as a question as retroactivity, the Court does not address this argument.